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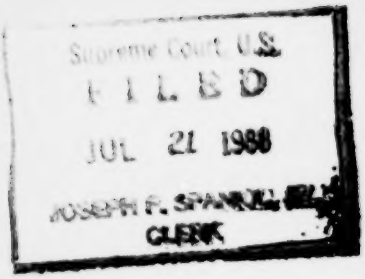

No.

In the Supreme Court of the United States

OCTOBER TERM, 1987

JOHN CARMEN CINCOTTI,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

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QUESTIONS PRESENTED

1. Where the only evidence presented to the grand jury in support of a particular element of the crime subsequently charged in one count of an indictment is later found to be incorrect, is a defendant entitled to a dismissal of the indictment, or at least that count to which the incorrect evidence pertained?

2. Does the application of a ruling of this Court making certain conduct illegal which conduct was said not to be illegal by the Circuit Court of Appeals at the time of its commission violate the ex post facto clause of the Constitution?

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TREATIES AND TEXTS

The petitioner John Carmen Cincotti respectfully prays that a writ of certiorari issue to review the judgments and opinions of the United States Court of Appeals for the First Circuit, described below.

OPINION BELOW

The opinion of the United States Court of Appeals for the First Circuit, decided May 24, 1988, has not yet been reported. A copy thereof appears in the Appendix hereto.

JURISDICTION

The Judgment of the United States Court of Appeals for the First Circuit was entered on May 24, 1988. The Petition for Certiorari was filed within sixty (60) days of that date. This Court's jurisdiction is invoked under 28

U.S.C. 1254 and Rule 17 of the United States Supreme Court.

CONSTITUTIONAL PROVISIONS AND STATUTES

1. Article I, Section 9, Clause 3 of The Constitution Of The United States.

   No Bill of Attainder of Ex Post Facto Law shall be passed.

2. 18 U.S.C. 1962(c)

   It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

3. 18 U.S.C. 1962(d)

> It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

4. 18 U.S.C. 1955(a)

> Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.

STATEMENT OF THE CASE

The petitioner, John Carmen Cincotti, (hereinafter referred to as Cincotti) together with six others, was named in a thirteen-count indictment returned by the grand jury in the United States District Court for the District of

Massachusetts. In Count I Cincotti was charged with conspiracy to violate the Racketeer Influenced and Corrupt Organizations Act; (hereinafter referred to as RICO); in violation of 18 U.S.C. 1962(d). In Count II he was charged with the substantive violation of RICO; 18 U.S.C. 1962(c). And, in Count IV he was charged with conducting an illegal gambling business; in violation of 18 U.S.C. 1955.

The defendant, Ralph Lamattina is a fugitive. The defendants, Richard Ernest Gambale, Peter James Limone and John Louis Orlandella, changed their plea to guilty prior to trial. Cincotti and the two remaining defendants, Jason Brian Angiulo and William Joseph Kazonis, went to trial before a judge and jury.

During the middle of the trial Cincotti filed a motion to dismiss alleging a Fifth Amendment violation because of a substantive amendment to the indictment. The motion was denied.

The jury returned guilty verdicts against Cincotti on all counts. From the judgments of conviction, Cincotti appealed to the United States Court of Appeals for the First Circuit. The Judgment of Conviction was affirmed on May 24, 1988.

The pertinent facts are as follows:

The government alleged that an organization known as the Mafia existed throughout the United States; that it existed in families in each of the major cities in the country; that Boston was a part of the Raymond Patriarca family of

New England which was headquartered in Providence, Rhode Island; and, that Cincotti was a soldier and a made member of the Mafia (Tr. 13-17-20).

Under RICO the government, as it was required to do, alleged that Cincotti engaged in a pattern of racketeering activity, or the collection of an unlawful debt. A pattern of racketeering activity requires at least two racketeering acts, sufficiently related to constitute a pattern. The government charged Cincotti with only two racketeering acts; (1) conspiracy to murder Harvey Cohen, and (2) conducting an illegal gambling business, to wit: poker games. To meet its burden, the government offered the following evidence:

In May of 1980 Special Agent Shaun Rafferty of the Federal Bureau of Investigation commenced a gambling investigation which focused on 51 North Margin Street in the North End Section of the City of Boston (tr. 15-89). At some point he prepared an affidavit in support of a request made by the government for an order authorizing electronic surveillance of the 51 North Margin Street premises (Tr. 15-90). The order was issued by the Court. On February 11, 1981, pursuant to the order, agents of the F.B.I. broke into the premises during the early morning hours and installed the necessary equipment for electronic surveillance (Tr. 15-103). Thereafter, conversations on the premises were recorded.

The last interception pursuant to this order occurred on February 26, 1981; the order terminated on March 1 (Tr. 15-103). On March 27, 1981 another order for surveillance was obtained (Tr. 15-152). Because the microphones had been removed after termination of the first order, the agents, on April 1, 1981, again broke into the premises to install equipment (Tr. 15-154). More recordings were made pursuant to this order.

On April 27, 1981 a third order was signed authorizing fifteen more days of interceptions (Tr. 15-165).

Numerous recordings were made of conversations at 51 North Margin Street. As the agent in charge of the investigation, Special Agent Rafferty took custody of the tapes after each

shift in which agents had worked making the recordings (Tr. 15-100). And, he listened to and reviewed all of the tapes (Tr. 15-176). In August of 1981, Rafferty was transferred to New Hampshire, after which Special Agent Merita Hopkins took over the investigation (Tr. 15-177-178).

In the main, evidence as to whose voice appeared on the tape recordings came from F.B.I. Agents who gave their opinion as to who was speaking on a particular tape. Transcripts were made of each tape with an agent designating each speaker. The name Cincotti appeared on many of the transcripts as a participant in a particular recorded conversation. In order to identify particular conversations, each tape and

transcript was given a number.

In early 1980 Special Agent Rafferty overheard Cincotti engaged in a conversation on a street in the North End. This conversation was approximately two minutes in duration. On May 18, 1981 the F.B.I., pursuant to a search warrant, conducted a raid on the North Margin Street premises. Special Agent Rafferty spoke with Cincotti on this occasion. As a result of these two incidents, Rafferty felt that he had become familiar with Cincotti's voice (Tr. 15-179). Rafferty listened to all of the tapes and reviewed the transcripts. He testified that he believed that Cincotti was the speaker (Tr. 15-185). Rafferty was the only person who identified Cincotti's voice as being on any of the tapes.

The search warrant for the 51 North Margin Street premises was executed on May 18, 1981 (Tr. 15-37). Cincotti was present at the time, seated at a table in the large room. Photographs were taken showing where everybody was positioned at the time of the search. A total of $9,583.00 was taken from the person of Cincotti. The money was in different packages; some with notations (Tr. 18-41-42). Part of the money was the payroll for the Chinese Restaurant in East Boston owned by Cincotti. He asked the agents not to take this money (Tr. 18-56).

Also seized from the person of Cincotti were two handguns (Tr. 18-59). However, he had a permit to carry the guns which had been issued by the Police Department in his home town of Wayland

(Tr. 18-73).

Special Agent Arthur Eberhart of the F.B.I. was found to be qualified as an expert on gambling businesses. He reviewed all of the tapes and transcripts for the purpose of determining whether or not a gambling business was being conducted at 51 North Margin Street (Tr. 18-139-140). Eberhart concluded that an organized high stakes poker game was taking place; and, that at least thirteen people were involved in running the game, including a card room manager, several dealers, errand people and owners or financial backers (Tr. 18-145). Eberhart was of the opinion that Cincotti was the card room manager (Tr. 18-150); the financial backers were Nicola Giso, Samuel Granito, Ralph Lamattina, Larry

Zannino and Gerry Angiulo (Tr. 18-159); and, the dealers were Steve, Freddy, Chubby and Vinny (Tr. 18-160).

Cincotti presented a defense. He called witnesses who explained the poker games and how and why they were run; and, that it was not a business. Rather, it was a social gathering every Monday and Thursday evening.

Henry Anzilotti lived at 66 North Margin Street. He worked as a supervisor at the Suffolk County Probate Court (Tr. 40-40). Anzilotti testified and produced documents showing that the North End Italo-American Club was formed and chartered by the Secretary of the Commonwealth in 1972. Anzilotti was a director (Tr. 40-41-42). The club was formed for the purpose of having a place

to socialize and hold parties. Socializing included playing cards (Tr. 40-43). They played cards on Mondays and Thursdays (Tr. 40-44).

Anzilotti had known Cincotti all of his life, and knew him to be a member of the club (Tr. 40-48).

Vincent Roberto, another member of the club, described for the jury how the poker games worked. He also explained that it was the poker games which financed the expenses of the club. The games, for the most part, were friendly; but on occasion, they were considered high stakes. There were standard rules for betting. The games were generally seven card stud, and a player could bet five dollars on the first card. However, if someone wanted to raise, they would

have to double it; so, the next bet would be ten dollars. And on it went. Generally, there was a ceiling. For the most part, the maximum bet did not exceed three hundred and twenty dollars. However, on occasion, when people like Larry Zannino and Ralph Lamattina played, the ante would go up (Tr. 40-55-69).

Even in the high stakes games it did not mean that everybody bet the maximum. There was a system whereby players could remain in the game but could only win or lose the amount they were in for. If, for example, a player had only three hundred and twenty dollars, he could play all in. This meant that he could play for no more than that amount. If there were seven players in the game and if he had the best hand, he could only collect

three hundred and twenty dollars from each player in the game. The second best hand among those players who played for more would win the remaining money (Tr. 40-60-63).

Roberto explained what was called a "rake". He told the jury that the rake was the amount of money taken out of each pot; that it never exceeded fifteen dollars; that the purpose was to take care of expenses, i.e., pay for food or whatever; that when expenses were met the rake would cease; and there was no profit from the rake (Tr. 40-62-64).

Sherman Feller, the public address announcer for the Boston Red Sox, gave essentially the same testimony (Tr. 42-11-18). So, too, did Anthony Stancato (Tr. 42-69-88); Leonard Tammaro (Tr. 43-

2-17); Anthony Russo (Tr. 43-57-61); and, Alfred Silvestri (Tr. 43-64-77).

The defense also called its own gambling expert in the person of Jack Strauss, a professional gambler from Texas. Strauss has played all over the world. And, in 1983 he won the World Poker Championship (Tr. 4-134-140).

Strauss testified that he has played in games where there was a "rake". He described a "rake" as a percentage of a pot taken by the house (Tr. 4-145). The percentage could be whatever the house wanted it to be, but anything over one percent would make it almost impossible for any player to win. The house would end up with everything (Tr. 40-146). Usually, there is a gripe about the rake (Tr. 40-147).

Strauss listened to all of the tapes and read the transcripts. Based on the tapes and the transcripts he opined that there was a high stakes game (Tr. 40-148). However, he was also of the opinion that there wasn't much of a rake (Tr. 40-149). The following reveals his reason:

> Q. Did I understand you to say that you formed the opinion that there was no rake?
>
> A. I finally got it understood that they took off enough to pay for the --I saw where they were drinking brandy and

a l l - - everyone s e e m e d q u i t e satisfied with the food, and they must have taken off enough to pay for that. But I don't see where--and I really am an expert, and I don't s e e h o w they could have been making any profit out of this.

Q. Well, why do you say that Sir?

A. Because you would have heard these p e o p l e g r i p i n g about it if t h e y h a d been taking off--they g r i p e d

> about everything else. They griped about the dealers and they cursed every-- (Tr. 40-149).

He also explained that if there was a rake they would have to compute the percentage; for example, two percent of $5,460.00. And, there was never any mention of this on the tapes (Tr. 40-150).

Strauss was also of the opinion that Cincotti was not the card room manager. As he explained, "I don't think there was any manager. It just looks like there was a bunch of people playing. I wouldn't say he fit in more as the manager than anybody else. It looks like whoever lost the last hand was running

these games" (Tr. 41-9).

One of the tapes reviewed by Agent Eberhart which led to his opinion was a tape designated 2M(c) (Tr. 18-152). This was a tape of a conversation recorded at North Margin Street on February 23, 1981. According to the transcript, the participants in the conversation were Cincotti and some unknown male. According to the transcript, Cincotti was telling the unknown male about a poker game which was for high stakes. Eberhart listened to the tape at trial. He opined that Cincotti was controlling the chips; and so, in his opinion, Cincotti was a supervisor (Tr. 19-19).

During the playing of the tape in Court, Eberhart was asked if he heard the name "Fifi" at any time. He testified

that he did not. (Tr. 19-17).

Special Agent Merita Hopkins was called as a defense witness. The tape, 2M(c), was playing during this testimony. Agent Hopkins then heard the name "Fifi" on the tape (Tr. 44-107). In fact, she heard it twice (Tr. 44-108). However, up to that time, she had never heard "Fifi" on the tape before, and she had listened to it periodically for five years (Tr. 44-109).

Another witness called by the defense was Alfred Silvestri. He testified that he was also known as "Fifi" (Tr. 43-65). The tape, 2M(c) was played during the testimony of Silvestri (Tr. 43-69). He testified that he remembered that particular game (Tr. 43-70). He remembered it because that was

the first time in his life that he had won all of the chips; and, that before or since, he had never had four sixes with three of them in the hole (Tr. 43-72). Silvestri also testified that a person named Abigail was dealing during that game, and present was Skinny Richie, Vinny Roberto and Ralph Lamattina (Tr. 43-71). Cincotti was not there (Tr. 43-71).

On February 26, 1981, at 8:14 p.m., a recording was made of a conversation at North Margin Street. The tape was designated 5M. The transcript of this tape was prepared by Special Agent Hopkins, but it was Special Agent Rafferty who identified one of the voices thereon as being that of Cincotti (Tr. 43-141). This tape and transcript

concerned a person identified as Richie receiving instructions about collecting debts from certain people. Rafferty had originally identified the voice giving the instructions as being that of Cincotti.

Excerpts from tape 5M were used in the affidavit prepared by Agent Rafferty in support of the further order of the Court on March 27, 1981 for continued surveillance. At this time Rafferty identified Cincotti's voice (Tr. 45-12). While Rafferty did not appear before the grand jury (Tr. 45-13), he did testify in 1985 in the Gennaro Angiulo trial where he identified the voice of Cincotti as being on tape 5M (Tr. 45-13-14). However, about a week prior to the instant trial, Rafferty reviewed the

tapes at which time he became uncertain as to whether or not Cincotti's voice was on tape 5M. For this reason, the government did not offer the tape into evidence.

The voice on tape 5M was not that of Cincotti. It was Stephen Bethoney, who testified to that fact, as well as the fact that he remembered the conversation (Tr. 45-61-62).

With respect to the charge that Cincotti conspired to kill Harvey Cohen, the government offered two tapes; tape 11M(VI) recorded on April 3, 1981, and tape 61M recorded on April 23, 1981.

Tape 11M(VI) was a conversation in which the government alleges Cincotti, Zannino, and Ralph Lamattina participated. Tape 61M was a

conversation in which at least four persons participated. The government says that in addition to Cincotti, there was Ilario Zannino, Ralph Lamattina and Dominic Isabella. Agent Rafferty was the only person to identify the voice of Cincotti as appearing on these tapes.

The defense also presented as a witness, Carolyn Kingston, a professional singer, voice teacher and voice therapist (Tr. 46-48). She was able to identify voice characteristics (Tr. 46-54). She never spoke with Cincotti, and could not testify about his voice characteristics (Tr. 47-13). She did, however, listen to tapes in which the government claims that Cincotti was a participant in the recorded conversations.

Ms. Kingston listened to Tape 11M(VI) and used the transcript, but the names of the speakers were deleted. In those instances where it was claimed that Cincotti was the speaker, the letter "Z" was inserted. Ms. Kingston did a voice profile on that person (Tr. 47-24). When she listened to Tape 61M the names on the transcript were deleted, and where Cincotti was claimed to be the speaker, the letter "Y" was used (Tr. 47-26). A voice profile was also done on this person (Tr. 47-27). Ms. Kingston was of the opinion that "Z" and "Y" were not the same person (Tr. 47-28).

Ms.Kingston did the same with Tape 5M and Tape 2M(c). On transcript 5M the letter "X" was used to designate where Cincotti was supposed to be the speaker,

and on transcript 2M(c) the letter "A" was used (Tr. 47-28). She was of the opinion that "X" and "A" were the same voice (Tr. 47-29). She was also of the opinion that "Z" was not the same as "X" and "A" (Tr. 47-29); and, that they were different from "Y" (Tr. 47-30).

With respect to Tape 61M, there were four lines in which Cincotti was designated as the speaker. Ms. Kingston opined that the first two lines designated "Y" in the place of Cincotti were the same voice. The third line of "Y" was indistinguishable which did not permit a conclusion. But the final "Y" was possibly the same voice that was designated "X" on Tape 5M and "A" designated on Tape 2M(c) (Tr. 47-28).

REASONS FOR GRANTING THE WRIT

I. BECAUSE CINCOTTI MAY HAVE BEEN CONVICTED ON THE BASIS OF FACTS NOT FOUND BY, OR NOT EVEN PRESENTED TO, THE GRAND JURY, THE DECISION OF THE FIRST CIRCUIT UPHOLDING THE ACTIONS OF THE GOVERNMENT IN DELETING AN OVERT ACT FROM THE INDICTMENT CONFLICTS WITH PRIOR DECISIONS OF THIS COURT.

The grand jury serves the dual function of determining whether or not there is probable cause to believe that a crime has been committed and that a particular defendant committed it, and protecting citizens against unfounded criminal prosecutions. United States v. Sells Engineering, Inc., 463 U.S. 418 (1983). And, in performing these duties, any indictments returned must be well-founded. United States v. Dionisio, 410 U.S. 1, 13 (1973); Brandenburg v. Hayes, 408 U.S. 665, 688 (1972).

In the instant case the grand jury was asked to determine whether or not there was probable cause to believe that Cincotti engaged in the collection of unlawful debts. In order to assist the grand jury in making its determination the prosecution played tape 5M for the body. Additionally, Special Agent Regii explained what was happening on the tape. He explained that the conversation involved Cincotti giving instructions to a person named Richie LNU on the collection of a debt from Joe Sheehan. It does not appear that any other evidence was presented for consideration by the grand jury on the charge of collection of unlawful debts. Therefore, the grand jury determination was based solely on tape 5M and Agent Regii's

explanation which included that Cincotti was the speaker.

The RICO indictment, both conspiracy and substantive counts, was in the alternative, i.e., that Cincotti engaged in two or more predicate acts of racketeering, or that he engaged in the collection of unlawful debts. As to the conspiracy count, the government included a specific overt act based on tape 5M.

During the course of the trial the government, unilaterally deleted the overt act. This was done after Agent Rafferty was no longer certain that the voice on tape 5M was that of Cincotti. In fact, the voice was not that of Cincotti. It was Stephen Bethoney.

The First Circuit was of the opinion that no overt act need be proved in order

to sustain a RICO conspiracy conviction; therefore, deletion of what was not necessary in the first place did not harm Cincotti. However, the First Circuit overlooked the fact that this evidence which formed the basis of the overt act was the only evidence of collection of an unlawful debt, which formed the basis of the alternative element for a RICO charge.

The trial jury convicted Cincotti on both RICO counts. However, it is not known if the convictions were based on the predicate acts of racketeering or collection of unlawful debt. Cincotti urged upon the Circuit that evidence as to both was insufficient as a matter of law to sustain a conviction. The argument was rejected. It could well be

that Cincotti was convicted on the alternative theory of collection of unlawful debt. If so, he was convicted on facts not found by, or not even presented to, the grand jury. This would violate the holding of this Court in Russell v. United States, 369 U.S. 749, 770 (1962).

This Court has held that an indictment may be valid even if all the evidence presented to the grand jury was hearsay. Costello v. United States, 350 U.S. 359 (1956). Further, an indictment is not affected by the fact that some evidence to support it, which was presented to the grand jury, was obtained illegally. United States v. Calandra, 414 U.S. 338 (1974). However, it does not appear that the precise issue raised

in the instant case has ever been presented to this Court. Here, the government presented erroneous evidence to the grand jury. Relying thereon, the jurors indicted Cincotti. At least, as to so much of the indictment that charges collection of unlawful debt, Cincotti is entitled to dismissal.

II. THE RULING OF THE FIRST CIRCUIT ON THE EX POST FACTO ISSUE IS IN CONFLICT WITH THIS COURT'S DECISION IN BOWIE V. CITY OF COLUMBIA, 378 U.S. 347 (1964).

On September 23, 1980 the First Circuit ruled that, "RICO was not enacted as an offensive weapon against criminals, but as a shield to thwart their depredations against legitimate business enterprises." United States v. Turkette, 632 F.2d 896, 906 (1st Cir. 1980). (Hereinafter Turkette I). All of the

facts committed by Cincotti which were alleged to violate RICO occurred between January and May of 1981. On April 27, 1981 Larry Zannino, a co-conspirator, was overheard speaking to Gennaro Angiulo about Turkette I and the fact that their organization was safe from prosecution because they were illegitimate. On June 21, 1981, this Court reversed the First Circuit. United States v. Turkette, 452 U.S. 576 (1981). (Hereinafter Turkette II). Therefore, specific allegations of RICO violations by Cincotti between September 23, 1980 and June 17, 1981 were not illegal under the existing law at that time in this Circuit.

In Turkette II this Court offered an expanded judicial interpretation of the RICO statute. The question presented

then is whether applying this Court ruling to events that occurred after the First Circuit opinion but before this Court's decision would violate the ex post facto clause of the Constitution.

In Bowie v. City of Columbia, 378 U.S. 347 (1964), this Court extended the ex post facto clause to judicial statutory constructions. In so doing, the court reversed a conviction based on a judicial expansion of a state trespass law. The decision was based on the, "fundamental principle that 'the required criminal law must have existed when the conduct in issue occurred.'" Id., at 354 (quoting J. Hall, General Principles of Criminal Law 58-59 (2d ed. 1960). This Court held that the judicial expansion of the trespass statute deprived the

defendants of the fair-warning mandated by the Due Process Clause of the Fifth Amendment. Id. at 362.

In the instant case, there is no question that this Court's ruling in Turkette II expanded the boundaries of the RICO statute beyond what the First Circuit had previously decreed. The rationale of the Bowie case dictates that Cincotti's case runs afoul of the due process requirements insofar as a seemingly precise, and clearly defined, statute was broadened after the fact to make his conduct fall under RICO. The ex post facto clause clearly bars such a prosecution. As one commentator noted, "The few cases in point are in substantial accord that an act pronounced innocent in a prior decision interpreting

a statute or declaring a statute unconstitutional should not be rendered criminally punishable by a later overruling decision." Note, The Effect of Overruled and Overruling Decisions on Intervening Transactions, 47 Harv. L. Rev. 1403, 1407 (1934).

CONCLUSION

For the reasons stated above, the petitioner respectfully requests that certiorari be granted and the case set down for briefing and oral argument; or, in the alternative, that certiorari be summarily granted.

Respectfully submitted,

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88-128

(2)

No.

In the Supreme Court of the United States

OCTOBER TERM, 1987

JOHN CARMEN CINCOTTI,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI
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Appellee,

v.

JOHN CARMEN CINCOTTI,
Defendant, Appellant.

No. 86-2017
UNITED STATES OF AMERICA,
Appellee,

v.

WILLIAM JOSEPH KAZONIS,
Defendant, Appellant.

No. 87-1745

UNITED STATES OF AMERICA,
Appellee,

v.

JOHN CARMEN CINCOTTI,
WILLIAM JOSEPH KAZONIS,
JASON BRION ANGIULO,
Defendants, Appellants.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Robert E. Keeton,
U.S. District Judge]

Before

Coffin, Breyer and Torreulla,

Circuit Judges.

Robert L. Sheketoff with whom Kimberly Homan and Zalking, Sheketoff, Homan, Rodriquez & Lunt were on brief for appellant Jason Brion Angiulo.

Carolyn M. Conway with whom Francis J. DiMento and DiMento & Sullivan were on brief for appellant William Joseph Kazonis.

Willie J. Davis with whom Davis, Robinson & Smith was on brief for

appellant John Carmen Cincotti.

Frank J. Marine, U.S. Department of Justice, with whom Frank L. McNamara, Jr., United States Attorney, Robert S. Mueller, III, Acting United States Attorney, Jeremiah T. O'Sullivan, Jeffrey Auerhahn and John Voorhees, Special Attorneys, U.S. Department of Justice, were on briefs for appellee.

May 24, 1988

COFFIN, Circuit Judge. These are consolidated appeals from convictions on jury verdicts rendered after 58 days of trial. The defendants, Jason Angiulo, William Kazonis, and John Cincotti, were connected with the Patriarca Family of La Cosa Nostra, which has developed a reputation in United States law enforcement circles for highly organized criminal activities. Defendant Angiulo was convicted of participating in illegal

gambling (18 U.S.C. §1955); Kazonis was convicted of conspiring to obstruct and obstructing justice (18 U.S.C. §§ 371, 1503); and Cincotti was convicted of conspiring to participate and participating in an enterprise through a pattern of racketeering or collection of an unlawful debt (18 U.S.C. §1962(d) and (c), respectively) and participating in an illegal gambling business (18 U.S.C. §1955). We briefly describe the essential facts pertaining to these convictions and then discuss the issues raised by defendants on appeal.

I.

The bulk of evidence admitted against the defendants was the product of lengthy electronic surveillance, both

audio and video, conducted in 1981 at 98 Prince Street in Boston, the headquarters for operations of Gennaro Angiulo, father of defendant Jason Angiulo and a known "underboss" of the Patriarca Family,[1] and at 51 North Margin Street, Boston, the site of certain high-stakes poker games, with which defendant Cincotti had certain affiliations. Numerous search warrants executed by FBI agents in 1981 produced physical evidence that was introduced against Cincotti.

From this and other evidence introduced at trial, the jury would have been warranted in finding the following facts pertaining to each defendant:

---

[1] Gennaro Angiulo was separately convicted for crimes involving the alleged conspiracies at issue in this case. He is not party to this appeal.

John Cincotti

In 1980 and 1981, Cincotti and other individuals operated high-stakes poker games at 51 North Margin Street, Boston. Cincotti managed these games and extended credit to players. Chips were provided at $500 each to the players. Electronic surveillance conducted at one of these games revealed that betting reached a sum of over $10,000. Cincotti kept a list of the gambling debts owed by each player for each game. After a night of gambling, Cincotti would "settle accounts" with the players and negotiate further extensions of credit and terms of payment.

The gambling business at 51 North Margin Street was "owned" by a partnership that included Gennaro Angiulo

and Ilario Zannino, among others.[2] A recorded conversation between these two men, introduced at trial, revealed that Cincotti was responsible for keeping track of the profits earned by the gambling operation. On May 18, 1981, pursuant to authorized search warrants, FBI agents entered 51 North Margin Street while poker games were in progress and seized gambling paraphernalia. Searching Cincotti, they found on his person $9500 in cash and slips of paper containing the names of individuals owing debts from poker games that totalled over $56,000. The agents also found on a table next to Cincotti a spiral notebook containing

---

[2] Ilario Zannino, like Gennaro Angiulo, was also separately convicted for crimes involving the alleged conspiracies at issue in this case, but he is not party to this appeal.

names of players to whom credit had been extended that evening.

Tape recordings of conversations at 51 North Margin Street, not directly related to the gambling operation, revealed Cincotti's participation in a plot to murder one Harvey Cohen, the owner of an air freight business that operated in competition with a similar business run by the Patriarca Family. The recordings also revealed Cincotti's knowledge of murders previously committed by members or associates of the Patriarca Family in furtherance of the interests of the Family's operations.

Jason Angiulo

Between 1979 and 1981, Jason Angiulo managed and supervised a gambling operation known as "Las Vegas Nights."

Las Vegas Nights was routinely held at various locations in the Greater Boston area ostensibly to raise money for non-profit, charitable organizations. Testimony from members of the supposed sponsoring charities as well as from undercover FBI agents who attended Las Vegas Nights events revealed the following: (1) permits for certain events were obtained by falsifying signatures of members of charitable organizations in whose names the events were run; (2) gambling at the events was not operated by members of the charitable organizations that supposedly sponsored them; (3) events were held in the names of organizations that never authorized the use of their names; and (4) organizations, in whose names the events

were held, received, in some instances, only token portions of the proceeds and, in others, nothing. In conversations intercepted at 98 Prince Street between January and March 1981 and introduced at trial, Jason Angiulo discussed the division of profits from Las Vegas Nights with his father, Gennaro Angiulo, and others.

William Kazonis

Evidence from recordings made at 98 Prince Street on March 24 and 25, 1981 revealed that once a grand jury was convened to investigate matters described above as well as the activities of other alleged co-conspirators in the Patriarca Family, defendant Kazonis conspired with Gennaro Angiulo and others to obstruct the grand jury investigation.

One Walter LaFreniere had been involved in loansharking activities of the Patriarca Family. In March 1981, Gennaro Angiulo learned that LaFreniere had been served with a grand jury subpoena to testify about the nature of those activities. Although Gennaro Angiulo was aware that LaFreniere refused to testify on Fifth Amendment grounds, he expressed concerns to LaFreniere's Attorney, William Cintolo,[3] that if LaFreniere were granted immunity he would be compelled to expose the lending activities of defendant Jason Angiulo. A recorded conversation between Gennaro

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[3] Under separate indictment, William Cintolo was convicted for his role in the conspiracy to obstruct justice. On appeal, we affirmed his conviction. United States v. Cintolo, 818 F.2d 980 (1st Cir. 1987).

Angiulo, Richard Gambale, and Peter Limone[4] showed that Gennaro Angiulo asked the latter two to seek assurances from LaFreniere that he would not cooperate with the grand jury investigation. Gennaro Angiulo also instructed Cintolo to direct LaFreniere to refuse to testify and to serve a prison sentence instead. Other recorded conversations revealed that it was Gennaro Angiulo's intention to arrange the murder of LaFreniere if he did not cooperate. LaFreniere subsequently was informed by the FBI that there was a murder contract on his life.

On March 24, 1981, defendants Kazonis and Jason Angiulo met with

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[4] Richard Gambale and Peter Limone were indicted with the defendants. They each pleaded guilty to obstruction of justice.

Gennaro Angiulo. Kazonis explained that he had learned that LaFreniere planned to refuse to testify and to go to jail instead. After Gennaro Angiulo instructed defendant Jason Angiulo to testify falsely before the grand jury and he agreed to do so, the three men discussed the consequences that might befall defendant Jason Angiulo if he were caught lying. They also discussed the danger that LaFreniere's testimony posed for them. Gennaro Angiulo instructed Kazonis to meet with LaFreniere and explain the plan that he go to jail rather than testify. He made clear that it was Kazonis' responsibility to make sure that LaFreniere said nothing to the grand jury.

The following day, Kazonis reported back to Gennaro Angiulo and assured him that LaFreniere was told to keep quiet and go to jail for contempt. Later that same day, Kazonis and Cintolo each described to Gennaro Angiulo their meetings with LaFreniere and explained that they had each told LaFreniere that the maximum sentence he would serve for contempt would be 18 months.

On April 1, 1981, the government granted LaFreniere immunity for the testimony he was to give to the grand jury the following day. On April 2, Gennaro Angiulo and Cintolo instructed Kazonis to get a message to LaFreniere that if he were arrested for contempt, he should not talk to authorities. After seeking a continuance due to Cintolo's

disqualification as his attorney, LaFreniere eventually appeared before the grand jury on April 23, 1981 and refused to testify. On June 2, he was held in contempt and subsequently served 18 months in prison for that offense.

* * *

The defendants raise numerous issues on appeal. Cincotti raises issues that pertain only to his conviction. Angiulo and Kazonis raise issues in common. We begin by addressing Cincotti's arguments. We then turn to the common issues raised by Angiulo and Kazonis and related issues asserted individually by those defendants.

II.

We set the stage for our analysis of Cincotti's appeal by describing the allegations in the indictment pertaining to the RICO charges as well as the context in which Cincotti alleged errors at trial.

Cincotti was charged, in Count I, with conspiring to violate section 1962(c) of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§1961-1968, under 18 U.S.C. §1962(d). In Count II, he was charged with a substantive RICO violation under 18 U.S.C. §1962(c).[5]

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[5] Section 1962(c) reads in full:

> It shall be unlawful for any person employed by or associated with any enterprise engaged

In the RICO conspiracy county, the government alleged, in paragraph 1, that Cincotti, Angiulo, and Kazonis joined together, as members and associates of the Patriarca Family of La Cosa Nostra, and thereby constituted an "enterprise" within the meaning of 18 U.S.C.

> in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

The conspiracy provision, section 1962(d), provides: "It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section."

§1961(4).[6] Paragraphs 3 and 4 of Count I then described in detail the nature and structure of the alleged enterprise and its functional relationship with La Cosa Nostra. Paragraph 2 alleged that Cincotti and his co-defendants "agreed together . . . to conduct and participate, directly and indirectly, in the affairs of the Enterprise . . . through a pattern of racketeering activity as set forth in paragraphs 5 and 6 of this Count and the collection of unlawful debt, as set forth in paragraph

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[6] An "enterprise" is "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. §1961(4).

7 of this Count."[7] Paragraph 5 alleged

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7 A "pattern of racketeering activity" is "at least two acts of racketeering activity," the first having been committed after the enactment of RICO and the second occurring within ten years of the first. 18 U.S.C. §1961(5). Such acts include, inter alia, "any act or threat involving murder [or] . . . gambling . . ., which is chargeable under State law and punishable by imprisonment for more than one year." 18 U.S.C. §1961(1)(A).

An "unlawful debt" is defined as:

> a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling

that Cincotti engaged in two racketeering acts (or predicate crimes): (a) during April, 1981, he conspired with others to murder Harvey Cohen in violation of Massachusetts laws[8] and (b) from on or about October 20, 1980 until on or about May 18, 1981, he operated an illegal

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> in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate.

18 U.S.C. §1961(6).

[8] The alleged conspiracy to murder Harvey Cohen may be a predicate offense underlying the RICO conspiracy because it is listed as a predicate offense under section 1961(1). See United States v. Ruggiero, 726 F. 2d 913, 918-19 (2d Cir. 1984).

gambling business involving poker games in violation of Massachusetts laws. Paragraph 6 alleged that "[i]t was part of the conspiracy that [Cincotti] conducted and participated in, and agreed to conduct and participate in, the affairs of the Enterprise through a pattern of racketeering activity" involving the same acts described in paragraph 5. Finally, in paragraph 7, the government alleged that, as part of the conspiracy, Cincotti participated directly and indirectly in the affairs of the Enterprise "through the collection of unlawful debts . . . incurred and contracted in gambling activity" in violation of Massachusetts laws.

Count II incorporated, by reference, all of the allegations of paragraphs 1,

3, 4, 5, 6, and 7 in Count I. It simply reasserted those allegations as constituting the substantive violation of 18 U.S.C. §1962(c).

More than half-way through trial, on instructions from the district court, the government amended its original indictment to eliminate references to co-defendants who had pleaded guilty. The allegations in Counts I and II described above were identical in both the original and the redacted indictments. Cincotti filed a motion to dismiss, however, on the ground that the government made additional substantive changes, resulting in a violation of his Fifth Amendment right to be indicted by a grand jury. The district court denied that motion.

After the government rested, Cincotti moved for judgment of acquittal on the ground that he could not be convicted for the alleged RICO violations because at the time of the alleged violations, this court had held, in United States v. Turkette, 632 F. 2d 896 (1st Cir. 1980), rev'd, 452 U.S. 576 (1981), that RICO prohibited only racketeering activities that furthered the interests of legal enterprises, not illegal ones like the Patriarca Family. Even though that decision had been subsequently reversed by the Supreme Court, Cincotti contended that a conviction would violate his constitutional rights to due process because he would suffer from an ex post facto application of RICO. The district

court denied that motion also. The jury subsequently found Cincotti guilty of both the RICO conspiracy and the substantive RICO violation.

Cincotti now asserts the district court erred in denying his motion to dismiss the amended indictment and his motion for judgment of acquittal. He also argues that there was insufficient evidence to support his substantive RICO conviction. We address each argument in turn.

A. The Redacted Indictment

Cincotti contends that the district court erred in denying his motion to dismiss the indictment. He argues that by eliminating an allegation of a particular "overt act" in the redacted indictment, the government made a

substantive change in the RICO conspiracy count and that this deprived him of his constitutional right to be indicted by the Grand Jury.

Our assessment of Cincotti's position begins with a review of the requirements for a valid RICO conspiracy charge that we established in United States v. Winter, 663 F. 2d 1120, 1136 (1st Cir. 1981). In Winter, we held that to make out the elements of a RICO conspiracy charge the government must allege (1) the existence of an "enterprise;" (2) that the defendant knowingly joined the enterprise; and (3) that the defendant agreed to commit, or in fact committed, two or more specified predicate crimes as part of his participation in the affairs of the

enterprise. Id.; see also United States v. Turkette, 656 F. 2d 5, 8 (1st Cir.), on remand from 452 U.S. 576 (1981) (charges that defendant joined enterprise, knew of its criminal activities, and agreed to commit two illegal predicate offenses in furtherance of the enterprise legally sufficient to make out racketeering conspiracy count). We now add that an agreement to collect unlawful debts, or actual collection of unlawful debts, can alternatively constitute the third required element of a RICO conspiracy.

We did not consider, in Winter, the function that "overt acts" might play in a RICO conspiracy indictment. We now join with those circuits squarely holding that the commission of "overt acts" is

not required for a RICO conspiracy conviction. E.g., United States v. Coia, 719 F. 2d 1129, 1123-4 (11th Cir. 1983); United States v. Barton, 647 F. 2d 224, 237 (2d Cir. 1981). Since section 1962(d) does not, itself, require overt acts, there is no reason for us to imply such a requirement. Id. And we think the standards set forth in Winter are sufficient to the point of rendering superfluous any "overt act" requirement because, in any RICO conspiracy indictment the government must allege agreement to commit of commission of specified predicate crimes or, alternatively the collection of unlawful debts. That specificity is sufficient to alert defendants to the nature of the conspiracy for which they are being

charged.

In this case, the government retained, in its amended indictment, the identical allegations constituting the elements of a RICO conspiracy charge against Cincotti that were present in its original indictment: (1) the existence of an enterprise, (2) Cincotti's knowing participation in the enterprise, and (3) his agreement to commit or actual commission of two specified predicate crimes ("racketeering acts"). No further allegations were needed, but by alleging that Cincotti participated in the enterprise's affairs through the collection of unlawful debts associated with gambling operations, the government sufficiently alleged an alternative ground for the third required element of

the RICO conspiracy count.

"An indictment may not be amended except by resubmission to the grand jury, unless the change is merely a matter of form," but withdrawal of a portion of the indictment that the evidence does not support is not an impermissible amendment, "provided nothing is thereby added to the indictment, and that the remaining allegations charge an offense." United States v. Winter, 663 F. 2d at 1139-40. The government's deletion of an "overt act" in its redacted indictment that adequately had charged the substantive elements of a RICO conspiracy. Rather, by taking out the "overt act," the government merely eliminated a superfluous allegation that

the evidence did not support.[9] The redacted indictment added no new charges, and the remaining allegations charged the same offenses as the original. Under these circumstances, the changes in the indictment did not violate Cincotti's constitutional rights to be charged by indictment of the grand jury. See id. at 1140.

B. Due Process

Cincotti next argues that, under Bouie v. City of Columbia, 378 U.S. 347 (1964), he was deprived of his

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[9] The eliminated "overt act"--that Cincotti "instructed an underling to collect a gambling debt" -- was based upon an intercepted conversation and a voice identification of Cincotti. At trial, the government was unable to prove the voice identification because a government witness testified that he was uncertain whether the voice on the tape was that of Cincotti.

constitutional right to due process because he was convicted for violating RICO under an unforeseeable judicial construction of the statute, applied retroactively. He contends that during his participation in the activities that gave rise to his convictions, he had the right to rely upon our decision in United States v. Turkette, 632 F. 2d 896, where we held that RICO does not apply to wholly illegal enterprises. He reasons that since the Patriarca Family of La Cosa Nostra was a wholly illegal enterprise, his participation in its activities could not constitute grounds for a RICO conviction under Turkette. While recognizing that our construction of an "enterprise" under RICO was subsequently reversed by the Supreme

Court, 452 U.S. 576 (1981), he asserts that any application of the Supreme Court's decision would be an ex post facto application of criminal law in violation of his rights to due process of law.[10]

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[10] We decided Turkette on September 23, 1980. The Supreme Court granted certiorari on January 26, 1981, 449 U.S. 1123 (1981), and then issued its opinion reversing our decision on July 17, 1981. The indictment charged Cincotti with RICO predicate offenses occurring in April, 1981 (conspiracy to murder Harvey Cohen) and between October 20, 1980 and May 18, 1981 (the operation of an illegal gambling business). The government's proof at trial did not vary from these dates. Thus, all of the activities leading to Cincotti's conviction occurred between our decision in Turkette and the Supreme Court's reversal of that decision. Yet most of the alleged criminal activities occurred after the Supreme Court granted certiorari, a factor we consider below in assessing Cincotti's reasonable reliance on our opinion as an authoritative construction of RICO.

The government has supplied us with numerous counter arguments that check the progress of Cincotti's due process theory at every turn. We need not reiterate all of them to adequately dispose of this question.

This case is a far cry from the situation in Bouie. In that case, certain blacks entered a South Carolina restaurant and refused to leave when they were not served. There were no signs posted to indicate that the restaurant served whites only. The blacks were arrested and convicted for criminal trespass under a South Carolina statute that prohibited "entry upon the lands of another . . . after notice from the owner or tenant prohibiting such entry." Bouie v. City of Columbia, 378 U.S. at 349-50 &

n.1. The Supreme Court of South Carolina upheld their convictions by construing the otherwise "admirably narrow and precise" language, 378 U.S. at 351, to prohibit the act of remaining on the premises of another after receiving notice to leave.

Recognizing that the Due Process Clause supports the "basic principle that a criminal statute must give fair warning of the conduct that it makes a crime," id. at 350, the United States Supreme Court reasoned "[t]here can be no doubt that a deprivation of the right of fair warning can result . . . from an unforeseeable retroactive judicial expansion of narrow and precise statutory language." Id. at 352. Moreover, the Court said, "an unforeseeable judicial

enlargement of a criminal statute, applied retroactively, operates precisely like an ex post facto law, such as Art. I, §10, of the Constitution forbids." Id. at 353.

Upon surveying South Carolina caselaw and that of other states with statutes carrying similar language, the Supreme Court concluded that the construction that the South Carolina Supreme Court had given to its criminal trespass statute was virtually "'unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue.'" Id. at 354 (quoting Hall, General Principles of Criminal Law (2d ed. 1960) at 58-59), 356-62. Thus, the state court's unforeseeable construction

of the statute, applied retroactively, deprived the defendants of due process of law since, at the time they committed the charged offenses, they had no fair warning that their conduct was criminal. Id. at 361-62.

We cannot reasonably extend the principles of Bouie to the case at bar. In reversing our decision in Turkette, the Supreme Court held that the term "enterprise," as defined under 18 U.S.C. §1961(4), see supra note 6, plainly and unambiguously included illegitimate or illegal enterprises, and that nothing in the legislative history of the statute provided otherwise. 452 U.S. at 580-93. The use of that term in the RICO statute was so unambiguous, in fact, that the Court refused to apply the "rule of

lenity" to bar the application of its holding to the defendant in that case. Id. at 587-88 n.10. Implicit in the Court's rejection of the rule of lenity is the conclusion that the term was not sufficiently ambiguous to allow the defendant to be free of the retroactive application of the Court's decision. See id.; United States v. Ridgers, 466 U.S. 475, 484 (1984). Thus, unlike the situation in Bouie, where a narrowly and precisely drawn statute could not possibly have been foreseen to render criminal the conduct in question, the meaning of the term "enterprise" in the RICO statute has been held by the highest authority to be so lacking in ambiguity before our Turkette decision that individuals could not reasonably rely on

a possible limiting construction of that term to render their conduct non-criminal.

That this post hoc pronouncement differed from our own assessment can give little comfort to appellant. The fact that every other circuit court considering the issue had taken a stance opposite to our position in Turkette, see 452 U.S. at 578 & n.1, coupled with the fact that the Supreme Court readily granted certiorari, should have placed Cincotti on notice that throughout the period of his conduct in question the authority of our Turkette decision was precarious at best. See United States v. Rodgers, 466 U.S. at 484 (rule of lenity not applied to defendant whose conviction was vacated by a circuit court when

Supreme Court reversed opinion of that court and construed statute in question in line with every other circuit); cf. Bouie v. City of Columbia, 378 U.S. at 356-61 (neither plain statutory language nor South Carolina caselaw, or that of other states with similar statutes, in any way supported the construction adopted by the South Carolina Supreme Court). Thus, even if Cincotti established his reliance upon our decision in Turkette,[11] it would have

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[11] The government points out that there is no evidence in the record that Cincotti (as opposed to other alleged co-conspirators) did, in fact, rely upon our decision in Turkette when he engaged in the conduct that led to his RICO convictions. That lack of reliance, it seems, would vitiate his due process claim to be free of the retroactive application of the Supreme Court's decision in Turkette. See United States v. Camara, 451 F. 2d 1122, 1124-25 (1st Cir. 1971).

been unavailing because the Supreme Court's reversal of that decision was reasonably foreseeable. See United States v. Rodgers, 466 U.S. at 484.

C. Sufficiency of the Evidence

Cincotti's final argument is that his conviction for the substantive RICO violation should be reversed, or, in the alternative, a new trial granted due to insufficient evidence. In assessing this claim we view all of the evidence, including that pertaining to the credibility of witnesses, in the light most favorable to the government. United States v. Cintolo, 818 F. 2d at 983.

The government could have proved the RICO violation in one of two ways: by showing that Cincotti engaged in two predicate offenses or by showing that

Cincotti collected an unlawful debt. The government was required to show, in addition, that these acts were performed in furtherance of the Patriarca Family. See 18 U.S.C. §1962(c), quoted supra note 5. As we set forth above, there were two predicate offenses charged in the indictment: Cincotti's participation in a conspiracy to murder Harvey Cohen and his operation of an illegal gambling business, both in violation of Massachusetts law. In addition, he was charged with the collection of unlawful debts. While not contesting the sufficiency of the evidence pertaining to his operation of an illegal gambling business, Cincotti claims that the government failed to prove his participation in plans to murder Harvey

Cohen and his collection of unlawful debt. We think the evidence was sufficient on both of these issues. We address each in turn.

Cincotti asserts that the tape recordings of conversations intercepted at 51 North Margin Street, which were played to the jury, contained simultaneous conversations that the jury could not distinguish in order properly to ascertain that Cincotti participated in a conspiracy to murder Cohen. Relying on the testimony of his expert witness, a voice therapist, he also argues that the government failed to present evidence of voice identification. We disagree.

A government witness, FBI Agent Rafferty, testified that he listened to the tape recordings intercepted at 51

North Margin Street, and based upon how own personal conversations with the defendant, identified the voice as that of Cincotti. The government also introduced into evidence videotapes of Cincotti that showed his presence at 51 North Margin Street during the time that the subject conversations were intercepted. Rafferty's testimony together with the circumstantial evidence of Cincotti's presence at the time of the conversations constituted sufficient evidence for the jury to conclude that it was Cincotti who was present and participated in the conversations with Zannino. See, e.g., United States v. Vitale, 549 F. 2d 71, 73 (8th Cir. 1977); United States v. Vento, 533 F. 2d 838, 864-65 (3d Cir. 1976). Although Cincotti

presented testimony contrary to that of Agent Rafferty, it was up to the jury to weigh the credibility of the witnesses and resolve any conflicts in the evidence. See, e.g., United States v. Cuesta, 597 F. 2d 903, 915 (5th Cir. 1979); United States v. Vento, 533 F. 2d at 865.[12]

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[12] We do not agree with Cincotti's argument that the jury should have given more weight to the testimony of Carolyn Kingston, the voice therapist who testified on his behalf, than to that of Agent Rafferty. As the government points out, while concluding that the characteristics of the voice alleged to be that of Cincotti were not the same in tape recordings for April 3 and 23, Kingston testified that she had never spoken directly to Cincotti and could not testify about his voice characteristics. Moreover, the district court ensured that the jury would properly resolve any conflict in the testimony concerning voice identification by instructing them that the government was required to prove the defendants' voice identifications for all alleged intercepted conversations played to the jury.

The jury, having listened to the tapes at trial, had the opportunity to assess evidence that was sufficient to establish Cincotti's involvement in the murder scheme. As the government points out, the tape of the April 3, 1981 conversations reveals that co-defendant Zannino told Cincotti: "This Harvey Cohen. I'm going to kill him, Johnny," and the tape of the April 23, 1981 conversations contained the statement from Zannino to Cincotti and others: "Johnny. And Johnny here's another thing . . . you two and you. I want to kill Harvey Cohen very shortly. You ain't done a . . . thing but tellin' me you're going by his . . . house and see his car." These statements, taken together and viewed in the light most favorable to

the government, including any reasonable inferences to be drawn therefrom, were sufficient for the jury to conclude that Cincotti committed a RICO predicate offense by involving himself in a conspiracy to murder Harvey Cohen.

Cincotti does not contest the sufficiency of evidence for his illegal gambling conviction. That offense, coupled with the sufficient evidence that he participated in plans to murder Harvey Cohen constitute the commission of two predicate acts for his conviction on the substantive RICO count.[13] We nevertheless address Cincotti's challenge

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[13] Cincotti does not challenge the sufficiency of evidence concerning the existence of the "enterprise" or the government's proof that he committed the alleged predicate acts in furtherance of the enterprise's affairs.

to the sufficiency of evidence for the government's alternative basis for proving the RICO violation, that he allegedly collected of unlawful debts in connection with gambling operations.

Cincotti argues that all that was exposed by the government's evidence was his general involvement in gambling operations at 51 North Margin Street. He contends that there was no specific evidence of transactions that would constitute the collection of any "unlawful debt" as that term is used in the RICO statute. See 18 U.S.C. §1961(6), quoted supra note 7. He argues:

> [I]t would appear that the government is relying on collection of debts incurred in gambling activity. It is clear from the tapes that what is going on is the settling up at

> the end of a poker game. This was hardly the intent of Congress when RICO was passed.

Brief of John Cincotti at 48.

We disagree. The definition of "unlawful debt" clearly contemplates the type of gambling debts involved in the illegal poker games operated by Cincotti at 51 North Margin Street. See 18 U.S.C. §1961(6); Mass. Gen. Laws Ann. ch. 271, §5 (West 1970). From evidence gleaned from both intercepted conversations and the execution of search warrants, the jury could have concluded beyond reasonable doubt that Cincotti engaged in the extension of credit and the collection of debts for the illegal gambling operation, and that these activities were carried out to further the interests of the Patriarca Family.

This would support his conviction under 18 U.S.C. §1962(c).

In sum, there was sufficient evidence for the jury to find Cincotti guilty of the substantive RICO violation by concluding that he engaged in either the predicate offenses (participation in a conspiracy to murder Harvey Cohen and the operation of an illegal gambling business) or the collection of unlawful debts, all of which included participation in the affairs of the patriarca Family.

III.

The jury acquitted defendants Angiulo and Kazonis of the substantive RICO charges and the RICO conspiracy charges. It found Angiulo guilty, however, of operating an illegal gambling

business, and returned verdicts against Kazonis for conspiring to obstruct and obstructing justice. Angiulo and Kazonis raise several issues on appeal. First, they contend that the district court erred in making "Petrozziello findings" regarding the scope of their involvement in the RICO conspiracy as a predicate for the admission into evidence of co-conspirators' statements concerning murders. Second, they contend that they were deprived of a fair trial on the non-RICO counts because of the prejudicial "spillover" effect of that evidence. Third, they argue that the district court abused its discretion in admitting into evidence testimony from a government expert witness concerning their association with the Patriarca Family.

Fourth, they challenge, on several grounds, procedures followed in the government's recording and processing of conversations obtained through electronic surveillance at 98 Prince Street. Finally, they jointly assert that the government violated their Fifth Amendment rights to equal protection by using peremptory challenges systematically to remove blacks and Italian-Americans from the jury. We address each of these issues, as well as underlying sub-issues.

A. Petrozziello Findings

Angiulo and Kazonis challenge the admission into evidence of certain tape recordings of discussions intercepted at 98 Prince Street, including the discussions of Gennaro Angiulo and others concerning plans to murder Harvey Cohen,

threats on the life of Walter LaFreniere in relation to his grand jury testimony, and murders carried out in the past to further the interests of the Patriarca Family. These conversations were admitted against the defendants under the co-conspirator provision of the hearsay rule, Fed. R. Evid. 801(d)(2)(E).[14] The defendants contend that the district court erred in finding, pursuant to United States v. Petrozziello, 548 F. 2d 20, 23 (1st Cir. 1977), that the

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[14] Rule 801(d)(2)(E) provides, in pertinent part:

> A statement is not hearsay if -- . . . The statement is offered against a party and is . . . a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

government satisfied evidentiary prerequisites to the admission of this evidence under that rule.

Following typical procedures, at the close of the evidence the trial judge held a hearing, outside the presence of the jury, to make the Petrozziello determination. The court found that the government had shown that it was more likely than not that challenged statements concerning past and future murder plans were made in furtherance of the RICO conspiracy and that both Angiulo and Kazonis -- having committed the predicate acts charged in the indictment in furtherance of the Patriarca Family-- were members of that conspiracy.[15]

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[15] The court found, inter alia:

Each of the

> defendants Jason Brion Angiulo and William Kazonis was a member of the RICO conspiracy as an associate of the Patriarca Family of La Cosa Nostra for at least the period . . . during which statements of co-conspirators received in evidence were made and that each of them was a member with knowledge of the scope and nature of the RICO conspiracy.

Tr. vol. 50, pp. 165-66. The court further found "that each of the substantive crimes charged against each of the defendants in this case has been proved by a preponderance of the evidence to have been committed in furtherance of the RICO conspiracy." Id. at p. 169. Taking into consideration evidence of these defendants' frequent visits to 98 Prince Street, their participation in discussions and sessions involving decision-making by Gennaro Angiulo concerning various illegal activities of the Family, including some in which they participated, the

While not challenging the district court's general finding that they were

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district court concluded that both Angiulo and Kazonis

> [were] aware of the organizational relationship among Gennaro Angiulo and others who participated in conversations in his presence and that [they] knew the nature and scope of the RICO conspiracy--that is, the Patriarca Family of La Cosa Nostra--including its willingness to engage in extreme criminal activities, even murder, when those in decision-making positions felt the need to resort to extreme measures to protect what they perceived to be the interests of the organization.

Tr. vol. 51, pp. 41-44. The defendants objected to these conclusions.

members of the alleged RICO conspiracy, the defendants assert that there was no evidence that they knew that the scope of that conspiracy included murders or murder conspiracies. They claim, as a result, that conversations of alleged RICO co-conspirators concerning past or present murders in furtherance of the interests of the Patriarca Family should not have been admitted against them.[16]

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[16] Although the jury eventually acquitted both Angiulo and Kazonis on the conspiracy charges, it does not follow that the district court erred in finding that they were participating members of the RICO conspiracy for the purpose admitting evidence pursuant to Rule 801(d)(2)(E). While the more lenient preponderance of the evidence standard supports the district court's Petrozziello finding, the defendants' convictions for the RICO crimes would have to have been based, of course, upon findings beyond a reasonable doubt. See United States v. Masse, 816 F. 2d 805, 810 n.8 (1st Cir. 1987).

This argument lacks merit. As we recently pointed out in United States v. Cintolo, "[i]t is settled law . . . that one who joins an ongoing conspiracy is deemed to have adopted the prior acts and declarations of co-conspirators, made after the formation and in furtherance of the conspiracy." 818 F. 2d at 997; see also United States v. Baines, 812 F. 2d 41, 42 (1st Cir. 1987). As long as it is shown that a party, having joined a conspiracy, is aware of the conspiracy's features and general aims, statements pertaining to the details of plans to further the conspiracy can be admitted against the party even if the party does not have specific knowledge of the acts spoken of. See id.; United States v. Arruda, 715 F. 2d 671, 685 (1st Cir.

1983). The defendants do not challenge the court's finding that they were members of the alleged RICO conspiracy and it was not clearly erroneous for the district court to conclude that they were aware, generally, that the Patriarca Family engaged in violent crimes, even murders, to further its own interests. In these circumstances it was proper for the court to allow into evidence statements of alleged RICO co-conspirators concerning murder plans on behalf of the Patriarca Family. See United States v. Cintolo, 818 F. 2d at 998; United States v. Baines, 812 F. 2d at 42; United States v. Arruda, 715 F. 2d at 684-85.

B. Insufficient Limiting Instructions

The defendants' more substantial

claim is that the conversations pertaining to the organization's murder plans were completely irrelevant to the counts upon which the jury convicted them. They argue that even if the co-conspirator statements were admissible on the RICO counts, the district court did not properly instruct the jury to compartmentalize the evidence in a way that would sufficiently protect them from the jury's consideration of that evidence with regard to the non-RICO crimes for which they were convicted. As a result, they contend that they were prejudiced by "evidentiary spillover" and deprived of fair trials.[17]

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[17] This issue was raised on several occasions in the course of hearings pertaining to the district court's Petrozziello findings and proposed jury instructions. Tr. vol. 50,

In setting forth its Petrozziello findings the district court found that the conversations of alleged RICO co-conspirators regarding the murder plans wold be admissible as evidence tending to

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pp. 10-19, 72-76; Tr. vol. 51, pp. 77-87; Tr. vol. 52, pp. 217, 227. The defendants argued that the jury should have been instructed to ignore all alleged co-conspirator statements not pertaining to the particular predicate offenses charged against them. See Tr. vol. 50, pp. 17-18. Although conceding that they cannot claim improper joinder of substantive counts in the indictment, the defendants attempt to analogize from misjoinder cases to argue that an "appropriate limiting instruction" was necessary to safeguard against "evidentiary spillover." We have searched the record for a proposed limiting instruction from the defendants and found none. We note, however, that since the defendants objected throughout the trial to the jury's consideration of alleged co-conspirator statements pertaining to murders and maintained that objection when reluctantly accepting the limiting instruction proffered and given by the court, their challenge to the instruction is sufficiently preserved for our review.

show the defendants' motive, design or intent in participating in the RICO conspiracy or committing the other substantive violations charged in the indictment. Tr. vol. 50, p. 169. The court later instructed the jury to limit its consideration of the tape-recorded statements by alleged co-conspirators as follows (the defendants' names and the corresponding counts on which they were convicted are presented in italics):

> During the trial and especially during your hearing of the tape-recorded conversations you have heard evidence of alleged statements by alleged co-conspirators. Unless I instructed you otherwise in a particular instance, you may consider such evidence without any special limitations as you are weighing the charges against each of the defendants in Counts 1 [RICO conspiracy], 2 [substantive RICO violation], and 6 [conspiracy to obstruct justice

(Angiulo and Kazonis)] of the indictment except as to your consideration of predicate acts charged.

When you are considering Counts 3 [Cincotti], 4 [illegal gambling (Kazonis and Angiulo)], 5 [illegal gambling (Angiulo: "Las Vegas Nights")], 7 [obstruction of justice (Kazonis)] and when you are considering predicate acts charged in Counts 1 and 2, the following limiting instruction applies:

In relation to any charge against a particular defendant in Counts 3, 4, 5, 7 and 8, when you are considering evidence of a co-conspirator statement made when that defendant was not present, you may consider it for the limited purpose of such bearing, if any, as you find it to have in relation to the intent, motive or other state of mind of that defendant. You will not consider it for any other purpose except as permitted by the following instruction:

You will not consider evidence of a co-conspirator statement made when the defendant was not present as evidence of the defendant's participation in a particular offense or predicate act

> charged unless, first, that statement related to the particular offense or predicate act charged in the count you are considering and, second, that statement related to participation in that offense or predicate act by the defendant as to whom you are considering the charge. (Emphasis added.)

Tr. vol. 52, p. 175. In short, the jury was allowed to consider the statements of alleged co-conspirators for whatever purpose in their determination that Kazonis was guilty, and Angiulo not guilty, of conspiring to obstruct justice (Count 6). However, in considering whether Angiulo and Kazonis were guilty on the illegal gambling counts (Counts 4 and 5) and whether they were guilty on the substantive obstruction of justice counts (Counts 7 and 8), the jury could only consider the alleged co-conspirator

statements as they might bear upon those defendants' general states of mind, but not otherwise as proof of their commission of the crimes charged unless the statements related to (a) the substantive offenses charged and (b) the particular defendant's participation in that substantive offense. In addition, at the outset of its charge to the jury, the district court instructed the jury to consider separately each separate charge against each individual defendant. Tr. vol. 52, p. 145.

1. Co-Conspirator Statements and the Conspiracy to Obstruct Justice Charge Against Kazonis

While we recognize the inherent complications involved in designing a jury charge that will compartmentalize evidence of separate, but interconnected,

conspiracies in the context of a multiple defendant RICO trial of this sort, we are troubled by the court's instruction that the jury could consider, "without any special limitation," statements of the "alleged co-conspirators" in determining Kazonis' guilt or innocence in the alleged conspiracy to obstruct justice (Count 6). By so instructing, the court allowed the jury to consider statements of alleged RICO co-conspirators regarding plans to murder Harvey Cohen and others when determining whether Kazonis participated in a wholly separate conspiracy to obstruct justice. The statements pertaining to the conspiracy to murder Harvey Cohen and others were largely irrelevant to the latter

conspiracy.[18]

Nevertheless, we are convinced, in light of the evidence and what the jury did find, that any improper failure to give a further limiting instruction did not harm Kazonis.

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[18] We note, however, that Kazonis cannot object to the jury's consideration of statements concerning plans to murder Walter LaFreniere in assessing his guilt under Count 6. Although the indictment alleged that Kazonis conspired, with others, to obstruct justice by agreeing only "to threaten, inform, request and otherwise cause Walter LaFreniere to refuse to testify" before the Grand Jury, it also alleged that members of the same obstruction conspiracy agreed, as part of that conspiracy, to kill Walter LaFreniere. Since the district court found, by a preponderance of the evidence, that Kazonis was a member of the obstruction conspiracy and that violent means were employed by other members of the conspiracy to further its objectives, the statements of co-conspirators regarding plans to murder LaFreniere were admissible against him on Count 6. See, e.g., United States v. Cintolo, 818 F. 2d at 997-98; United States v. Arruda, 715 F. 2d at 685.

First, the jury did not find him guilty of either the RICO conspiracy or the substantive RICO offense charged in the indictment, and returned mixed verdicts against the defendants charged with those offenses. This shows that the jury was able to isolate evidence relevant to the RICO conspiracy from that relevant to the separate alleged conspiracy to obstruct justice. See United States v. Porter, 764 F. 2d 1, 13 (1st Cir. 1985) (fact that jury returned different verdicts against jointly charged and tried co-defendants indicates that court's limiting instruction enabled jury separately to consider evidence pertaining to guilt or innocence of each defendant).

Second, the instruction allowing the

jury unlimited consideration of the alleged RICO co-conspirators' statements did not apply to or taint the jury's conviction of Kazonis for the substantive obstruction of justice count (Count 7), and there was more than sufficient evidence for the jury to find that Kazonis obstructed justice by interfering with LaFreniere's appearance before the grand jury. See supra pp. 7-8. To convict Kazonis for conspiring to obstruct justice, the jury needed to find, in addition to the elements of the substantive offense, only that Kazonis agreed, or reached an understanding, with others to accomplish that offense. The existence of such an agreement or mutual understanding was established by more than substantial evidence, see supra at

p. 7, regardless of the collateral evidence of statements of alleged RICO co-conspirators concerning the Patriarca Family's murder plans before the jury.

Thus, we find harmless beyond reasonable doubt the district court's error in allowing the jury broadly to consider alleged RICO conspirators' statements in assessing the separate obstruction of justice conspiracy charge asserted against Kazonis. Cf. United States v. Lane, 106 S. Ct. 732, 732-33 n.13 (1986) (error involving misjoinder of defendants requires reversal only if it had a substantial and injurious effect or influence in determining jury's verdict, and a limiting instruction to jury to separately consider evidence for guilt of separate defendants minimizes

any prejudice).[19]

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[19] In so concluding, we also reject Kazonis' contention that he was entitled to an instruction that the scope of his involvement in the alleged conspiracy to obstruct justice did not include murder plans. Brief of William Kazonis at 22-24. As we pointed out, supra note 18, the government did not allege that Kazonis agreed to murder LaFreniere as part of the conspiracy to obstruct justice, but the statements of co-conspirators who did plan to murder LaFreniere in order to carry out the same conspiracy to obstruct justice were admissible against him. Moreover, in instructing the jury on the alleged conspiracy to obstruct justice, the district court did not focus the jury's attention on statements concerning any murder plans. It properly instructed that the government was required to prove that Kazonis intentionally agreed to obstruct justice through unlawful means, which could include efforts to advise or plan "with the witness to invoke the Fifth Amendment improperly" or "to limit or give false testimony before the Grand Jury." Finally, there was clearly sufficient evidence for the jury to convict Kazonis of conspiring to obstruct justice without taking into account statements concerning the Family's murder plans. See supra p. 7.

2. Co-Conspirator Statements and the Substantive Charges Against Kazonis and Angiulo

On the substantive charges that Angiulo engaged in an illegal gambling business and Kazonis obstructed justice (Counts 5 and 7), the Jury was permitted to consider statements of "alleged co-conspirators" for the bearing such statements might have on the defendants' "intend, motive or other state of mind."

We can understand that the statements of members or associates of the Patriarca Family could be relevant to show how it deals with those who either fail to cooperate with the Family or interfere with its operations. In that sense, statements of the alleged RICO co-conspirators pertaining to murder plans could be relevant to show why individuals

knowledgeable in the affairs of the Family would carry out certain offenses on its behalf.[20] As part of its Petrozziello findings, the district court found, by a preponderance of evidence, that both Angiulo and Kazonis were associates of the Patriarca Family and knowledgeable in its affairs and that they carried out the predicate acts charged in the indictment in furtherance

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[20] Kazonis was charged with substantive obstruction of justice both as a predicate offense underlying the RICO counts and as a separate offense. Angiulo was charged with the operation of an illegal gambling business both as a predicate offense of the RICO counts and as a separate offense. We understand how -- given the interconnection between the separately charged offenses and the predicate acts underlying the RICO conspiracy count for both Kazonis and Angiulo -- the district court could conclude that Rule 801(d)(2)(E) permitted the admissibility of these statements against all members of the charged RICO conspiracy.

of the Family's interests. Thus, statements by the RICO conspirators showing generally how the Family dealt violently with uncooperative individuals could have been relevant to show Angiulo's and Kazonis' states of mind in agreeing to carry out the predicate offenses underlying the RICO counts as the court instructed. Cf. United States v. Daly and Giardina, Nos. 87-1257, 87-1258, slip. op. (2d Cir. March 28, 1988) at 2295 (taped conversations of alleged RICO co-conspirators not mentioning defendant admissible to show setting of alleged offense).

On the other hand, as both Kazonis and Angiulo point out, the relevance of such statements is highly attenuated when there is no proof that they had actual

knowledge of the contents of those statements. The fact that such conversations included discussions of murder added the possibility that they could prejudice the defendants if given undue weight by the jury. We night question the propriety of the court's instruction, in this light, were it not for the subsequent limitation (italicized in the excerpt above) that minimized the weight that the jury attached to such statements; the jury was only permitted to consider such statements, beyond implications as to the defendants' states of mind, if they were made in the presence of the particular defendant in question and related to the offense for which that defendant was charged.

For Angiulo, the statements of alleged co-conspirators relating to murder plans, made outside of his presence and unrelated to the charge that he operated an illegal gambling business, were not probative on that alleged offense. That the Patriarca Family was willing to murder people that interfered with, or failed to carry through, its operations was irrelevant to Angiulo's state of mind in conducting such an operation. Nevertheless, the limiting instruction (set forth in italics above) properly directed the jury not to consider those statements in deciding whether Angiulo participated in the illegal gambling offense unless he was present when the statements were made and

they related to that offense.[21] Looking at the instruction as a whole, we conclude that it did not result in prejudicial error warranting reversal of Angiulo's conviction for operating an illegal gambling business. Cf. United States v. Porter, 764 F. 2d at 13 (appropriate limiting instructions adequately safeguarded against evidentiary spillover; we will not entertain speculative allegations of prejudice).

For Kazonis -- who was found by the district court, in its Petrozziello findings, to be a member of the alleged

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[21] There were no alleged co-conspirator statements admitted into evidence concerning murders that were made in Angiulo's presence and related to his alleged operation of Las Vegas Nights.

RICO conspiracy, knowledgeable about the Family's general operations (including murders), and to be furthering the Family's interests through the obstruction of justice -- evidence of the Family's practices in dealing violently with those they disapproved of may have had some bearing on his intent or motive to interfere with LaFreniere's testimony before the grand jury. See United States v. Daly and Giardina, supra at 2295. In any event, the limiting instruction insured that, in assessing Kazonis' "participation" in the substantive obstruction of justice offense, the jury would not consider the statements concerning the Family's murder plans, other than those involving Walter LaFreniere, see supra note 18, because

those statements were made outside of Kazonis' presence and were unrelated to the alleged obstruction of justice. Beyond this, the district court properly instructed the jury on the specific facts that the government was required to prove in order to convict Kazonis for obstructing justice, see supra note 19, and there was more than sufficient evidence for the jury to convict him on that count, without any consideration of statements pertaining to murder plans. See supra pp. 7-8.

C. Admissibility of Expert Witness Testimony Concerning the Defendants' Association with the Patriarca Family

The government called FBI Agent James Nelson to give expert testimony on the structure and operations of La Cosa Nostra and, after listening to evidence

presented at trial, his opinion regarding the defendants' relationships to that organization. He testified that both Angiulo and Kazonis were "close associates" of the Patriarca Family of La Cosa Nostra.

While not contesting Agent Nelson's qualifications as as an expert on La Cosa Nostra, Angiulo and Kazonis argue that his testimony violated their rights to confrontation under the Sixth Amendment because the district court allowed him to testify even though he did not reveal the identity of certain informants. They also contend that the district court improperly admitted his testimony on issues that were within the province of the jury or related to the defendants' states of mind. We address each of these

contentions.

At trial, the defendants maintained that allowing Agent Nelson to testify without disclosing the identities of informants would violate Rule 705 of the Federal Rules of Evidence, which requires expert witnesses to disclose facts and data underlying their opinions on cross-examination.[22] They also argued that they would be deprived of their Sixth Amendment rights to fully cross-examine

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[22] Rule 705, "Disclosure of Facts or Data Underlying Expert Opinion," provides:

> The expert may testify in terms of opinion of inference and give reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

the witness because they would not be able to ascertain or test his credibility without knowing the sources of his information. While preserving an objection that none of his testimony should be allowed, the defendants agreed to the court's instruction to Agent Nelson that he not answer any questions on direct examination that would be based upon information provided by informants whose identity he could not disclose on cross-examination.

The defendants contend that the court's instruction to Agent Nelson failed adequately to protect their confrontation rights for the following reasons: Agent Nelson was entrusted to sort out, in his own mind, those opinions grounded upon information that he was

willing to disclose and those grounded upon sources he could not disclose; as such, to the extent that some of the sources he would not disclose had provided information that contradicted the opinions he was otherwise willing to express, the defendants were deprived of information that would allow them to test the credibility of his testimony on cross-examination. We disagree.

Although the defendants claim that the jury could not have believed otherwise than that Agent Nelson based his opinion that they were close associates of the Patriarca Family on the wide range of informants with whom he had conferred, including those whose identities he would not reveal, Agent Nelson testified that his particular

opinion regarding these defendants' relationship to the organization was based only upon tape recordings played at trial. Tr. vol. 29, p. 112.[23] Moreover, the defendants were given wide-ranging opportunities to cross-examine Agent Nelson on his opinions that the factual bases underlying them. Under these circumstances, we find no merit in the defendants' contention that Agent

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[23] Agent Nelson testified about the different positions held by various individuals in the organization and the titles associated with those positions. Using a diagram, he explained that, based on his analysis of the tape recordings, Raymond Patriarca was the "boss" of the Patriarca Family, Gerry (Gennaro) Angiulo was the "underboss," Nicolas Angiulo was the "consigliere," and that John Cincotti was a "soldier" in the "capo regime" of Larry Zannino. Tr. vol. 29, p. 110. He testified that Jason Angiulo and William Kazonis fell within the category of close "associates" of the Patriarca Family. Id. at 121.

Nelson's testimony was admitted in violation of Rule 705's requirement that experts disclose, on cross-examination, factual sources underlying their opinion testimony. See United States v. Hensel, 699 F. 2d 18, 39 (1st Cir. 1983). Nor do we find the defendants' rights to adequate cross-examination of this witness under the Confrontation Clause in any way threatened by the procedures followed. See, e.g., Delaware v. Fensterer, 474 U.S. 15 (1985); United States v. Bastanipour, 697 F. 2d 170, 176-77 (7th Cir. 1982).[24]

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[24] The defendants seem to argue that even if Agent Nelson's particular testimony concerning Angiulo's and Kazonis' association with the Patriarca Family was based upon evidence presented at trial, he could not have formed his opinions concerning collateral relationships in the organization that were essential to that testimony, without

The defendants nevertheless argue that the district court erred by overruling their objections that Agent Nelson's testimony was inadmissible under Rule 702 of the Federal Rules of Evidence, because it was not helpful to the jury's factfinding,[25] and Rule

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access to informants' disclosures to him. A careful review of the record reveals, however, that Agent Nelson was able conclusively to form his opinions on these collateral relationships in the organization from non-confidential sources of information.

[25] Rule 702 provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may

704(b), because his description of their particular activities was an impermissible expert opinion on their intent to commit the crimes for which they were found guilty.[26] Neither

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testify thereto in the form of an opinion or otherwise.

26 Rule 704(b) provides:

> No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.

argument is persuasive.

Rule 704(b) does not apply to Agent Nelson's testimony because he did not testify as an expert on the defendants' mental states. See United States v. Cox, 826 F. 2d 1518, 1524-25 (6th Cir. 1987). His testimony that the tapes indicated that they were close associates of the Patriarca Family was simply not a statement of opinion about defendants' mental state or condition. That it may have provided part of the basis for an inference of such state is unhelpful to defendants. See United States v. Daly and Giardina, supra at 2296-97.

Although we have recognized that expert testimony of law enforcement officials concerning the particular methods and practices of those engaged in

organized criminal activity carries the risk of prejudicing criminal defendants, we have made clear that such evidence is often helpful to the factfinder in understanding the criminal activity at issue. United States v. Hensel, 699 F. 2d at 38; see United States v. Daniels, 723 F. 2d 31, 33 (8th Cir. 1983). We give district courts broad discretion to determine the admissibility of such expert testimony. Hensel at 38. Expert testimony, similar to that of Agent Nelson, is helpful in cases where juries must make determinations about the nature and structure of complex criminal organizations alleged to be engaged in criminal activities. E.g., United States v. Patterson, 819 F. 2d 1495, 1507 (9th Cir. 1987); United States v. Ardito, 782

F. 2d 358, 363 (2d Cir. 1986); United States v. Riccobene, 709 F. 2d 214, 230-31 (3d Cir. 1983). In the circumstances of this case, Agent Nelson's testimony assisted the jury in understanding the complex structure of the Patriarca Family and the defendants' relationship to members of that organization, as evidenced by the tape recorded conversations. The district court did not abuse its discretion in admitting Agent Nelson's testimony under Rule 702.

D. Challenges to the Government's Electronic Surveillance

Alleging that the government violated various provisions of the Omnibus Crime Control and Safe Streets Act of 1969 pertaining to "Wire and Electronic Communications Interception and Interception of Oral Communications,"

18 U.S.C. §§ 2510-2521, Angiulo and Kazonis moved to suppress all tape recordings of conversations recorded by the government at 98 Prince Street and 51 North Margin Street. After hearing arguments and taking written submissions from the parties, the district court denied the defendants' motions. United States v. Gambale, 610 F. Supp. 1515 (D. Mass. 1985). The defendants now assert that the court erred in failing to suppress that evidence, or, alternatively, by not providing them with evidentiary hearings on their suppression motions.

As a preliminary matter, we agree with the district court that Angiulo and Kazonis had no standing to challenge the admissibility of the tape recordings made

at 51 North Margin Street. We adopt the well-reasoned opinion of the district court on that point. 610 F. Supp. 1521-22. Thus, we focus solely on the defendants' challenges to the tape recordings of conversations recorded at 98 Prince Street.

1. Background

Electronic surveillance of 98 Prince Street began on January 19, 1981 and continued through May 3, 1981. On April 10, 1981, the district court granted the government's motion for a "disclosure order" pursuant to 18 U.S.C. §2517(5), thereby allowing the government to utilize intercepted conversations to prosecute offenses that were not specified in the district court's surveillance orders, including the RICO

charges.

The government did not simultaneously record duplicate originals of all recorded conversations, but made copies of all the conversations as the surveillance progressed. In the course of the surveillance, the agents monitoring the tapes became aware of audibility problems. On May 5, 1981, the original tapes were placed under seal and supervision of the district court in compliance with 18 U.S.C. §2518(8)(a), which provides that "[i]mmediately upon the expiration of the period of the order [authorizing surveillance], . . . such recordings shall be made available to the judge issuing such order and sealed under his directions."

On three occasions, however, between June and September 1981, the government moved for and was granted the right to unseal the bulk of the original tape recordings (over 300 in total) for audio enhancement purposes. The government allegedly needed to use the originals for the enhancement process because of background noise in the copies. Pursuant to judicial order, the government was permitted to transport the tapes to Washington, D.C., where they were enhanced and then returned to the court and placed under seal again.

After the grand jury returned its indictment, Angiulo, Kazonis and other co-defendants filed motions to suppress the tape recordings contending, inter alia, that the court should suppress the

original tapes because (1) the sealing requirement of 18 U.S.C. §2518(8)(a) had been violated, (2) the government failed to minimize the interception of conversations outside the scope of the court's surveillance orders in violation of 18 U.S.C. §2518(5), and (3) under 18 U.S.C. §2517(5), the court could not allow the government to utilize (or "disclose") intercepted conversations unrelated to offenses set forth in the surveillance orders. The defendants now appeal the district court's denial of their motion to suppress on these grounds.[27]

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[27] Although the defendants assert, in the alternative, that they should have been granted evidentiary hearings on these issues, in their motion before the district court they sought such a hearing only on their contention that the government violated the statutory

2. Sealing Requirements

The question of whether and under what circumstances the government may unseal tape recordings previously sealed pursuant to 18 U.S.C. §2518(8)(a) is one of first impression for us, and it has not, to our knowledge, been addressed by any other circuit.

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minimization requirements. See Record Item #184 (defendants' motion and memorandum in support of motion to suppress and for evidentiary hearing). Their argument concerning the alleged violation of the sealing requirement centered solely on legal questions; they relied primarily on evidentiary material from the case of co-defendant Cintolo for their factual assertions. In arguing that the disclosure order was improper, they moved for additional discovery of grand jury proceedings, but not for an evidentiary hearing. The district court denied the defendants' request for an evidentiary hearing on the minimization issue, and we review only that denial of an evidentiary hearing. See infra note 32.

Section 2518(8)(a) provides, in pertinent part, as follows:

> The recording of the contents of any wire, oral, or electronic communication under this subsection shall be done in such way as will protect the recording from editing or other alterations. Immediately upon the expiration of the prior of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions. Custody of the recordings shall be wherever the judge orders. . . . The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire, oral, or electronic communication or evidence derived therefrom under subsection (3) of section 2517.[28]

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[28] Section 2517(3), which "is the general authorization-for-use statute concerning intercepted communications," United States v. Mora, 821 F. 2d 860 n.2 (1st Cir. 1987), provides:

We recently addressed, in United States v. Mora, 821 F. 2d 860 (1st Cir. 1987), the issue of whether section 2518(8)(a) mandated the suppression of intercepted conversations when the government failed "immediately" to place original tapes under judicial seal after the expiration of the period for authorized surveillance. We concluded

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> Any person who has received, by any means authorized by this chapter, any information concerning a wire, oral, or electronic communication, or evidence derived therefrom intercepted in accordance with the provisions of this chapter may disclose the contents of that communication or such derivative evidence while giving testimony under oath or affirmation in any proceeding held under the authority of the United States or of any state or political subdivision thereof.

that section 2518(8)(a) contained its own exclusionary rule, and if the government failed to comply with the sealing requirements of that section, surveillance evidence would have to be suppressed unless the government proved by clear and convincing evidence that there was a "satisfactory explanation" for its failure immediately to seal. Id. at 866-68. Recognizing that the essential purpose of this section "is to protect the authenticity and accuracy of the recordings," we held that the government's first task in establishing a "satisfactory explanation" would be to prove that the integrity of the tapes had not been compromised. Id. at 867. If it met that burden, the government would then be required to show that its delay

in sealing came about in good faith and that such delay did not prejudice the accused or provide the prosecution with a tactical advantage. Id. at 868-69.

The district court's decision not to suppress the tapes in the case at bar was made prior to our decision in Mora. The court concluded, in any event, that cases from other circuits addressing the problem of delays in sealing were inapplicable to the question of whether a judicial order allowing unsealing was proper. United States v. Gambale, 610 F. Supp. at 1526. It held that Congress simply failed to address the question of unsealing, and that courts have "inherent authority to order unsealing of tapes previously sealed upon a showing of good cause." Id. The district court

therefore rejected the defendants' position that the statute automatically required suppression of the tapes because of the government's unsealing.

We agree that the defendants' argument for automatic suppression of unsealed tapes is untenable. While such unsealing should never be allowed as a matter or course, as the district court concluded, for good cause shown.[29] On the other hand, defendants are not without protection in the unsealing

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[29] We recognize that there may be many instances in which either the prosecution or the defense would want to unseal original tape recordings. The prosecution, for instance, might need to check the originals against portions of duplicates that were inadvertently erased. Defense counsel, in turn, might ask that the tape recordings be unsealed so that they can check the accuracy of duplicate tape recordings or transcripts that they have obtained through discovery from the prosecution.

context; we think that the standards applicable in delay-of-sealing cases, like Mora, are relevant to the unsealing problem.

The court's order allowing the government to unseal the original tapes and transport them to Washington, D.C. for enhancement outside the presence of any judicial officer created a risk that the original tapes could be altered or tampered with. We agree with the district court's apparent reasoning, see 610 F. Supp. at 1526, that there was perhaps some moral deterrent to the agents' alteration of the tapes since the government's unsealing and transportation of the tapes was prescribed by court order. But that does not eliminate the risk of alteration addressed by section

2518(8)(a).

In cases involving unsealing of tapes, there would seem to be no less of a risk of frustrating the purposes of underlying section 2518(8)(a) -- the assurance of the accuracy and genuineness of tape recordings -- than in situations where the government fails "immediately" to place the original tapes under seal. To the extent that the procedures followed in sealing or unsealing compromise the integrity of tape recorded conversations, the congressional purposes underlying section 2518(8)(a) would be thwarted and suppression of that evidence would be called for. See United States v. Mora, 821 F. 2d at 867. We therefore conclude that the guidelines set forth in Mora apply to cases involving the

government's unsealing.

Accordingly, judicial orders authorizing the unsealing of tape recordings previously placed under judicial seal pursuant to section 2518(8)(a) should be granted only for good cause shown by the government. If the unsealing of such tapes is challenged in a motion to suppress, the government should be required to prove (1) that the unsealing and use of the tapes did not result in alterations or tampering and (2) that the circumstances necessitating unsealing were not manufactured for tactical gain and that the defendants will not be unduly prejudiced as a result of the unsealing. See United States v. Mora, 821 F. 2d at 867-68.

In this case all standards have been met. First, the district court properly found that the government made a "good cause" showing for the temporary unsealing. United States v. Gambale, 610 F. Supp. at 1526. Second, although the court made no pretrial findings, the record shows that there was extensive examination and cross-examination of the agents involved in the custody and enhancing of the tapes while unsealed, and permits only the conclusion that the integrity of the tapes was not compromised. The chain of custody was clearly established, the extensive spatial security arrangements at the FBI headquarters, where the tapes were kept, were described, and agents Quinn and Ritenour, who were in charge of the

custody and enhancement process, testified unequivocally that there were no unauthorized persons with access to the tapes, no tampering, no deletions, and no additions.[30] Third, we find no indication of suggestion of bad faith or of unnecessary delay in returning the tapes to the court after enhancement.

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[30] While, in this case, the government had no trouble in establishing the integrity of the tapes while unsealed, the potential for challenging witnesses' memories and credibility suggests the prudence of minimizing the problem of proving that no alterations occurred. For instance, the government could make simultaneous original recordings so that one untouched original could always remain under seal. Alternatively, if only one original is made and sealed, and only the original will do for enhancement, a copy of the original could be left under seal with the court. In either case, the defendant would then be able to check the enhanced original against a sealed original or copy for possible alterations.

3. Minimization

The defendants contend that the tapes should not have been admitted against them because the government violated section 2518(5), which requires that every authorized surveillance "shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter . . .." 18 U.S.C. §2518(5). They argue that the government's practice of "intermittent monitoring" -- the practice of randomly turning the recording equipment on for two minutes and then off for one minute -- was not proper compliance with section 2518(5)'s "minimization" requirement; and they point to the government's widespread interception, in the early weeks of

surveillance, of conversations that there noncriminal in nature as evidence of the government's violation of the statute. We agree with the district court's treatment of these arguments. See United States v. Gambale, 610 F. Supp. at 1527-29.[31]

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[31] In addressing the defendant's argument, the district court made certain factual findings. It found:

> Every monitoring agent maintained a log book in which the date, time, and substance of any intercepted communications were recorded, as well as the identities of the participants, if known. Other agents reviewed the logs and tapes on a daily basis and give-day progress reports, submitted to the supervising judge, detailed the progress and results of the surveillance.
>
> . . .
>
> Monitoring ceased when agents determined that only personal, non-criminal activity was being discussed. Such intermittent

The Supreme Court has pointed out that section 2518(5) "does not forbid the interception of all nonrelevant conversations, but rather instructs the agents to conduct the surveillance in such a manner as to 'minimize' the interception of such conversations. Whether the agents have in fact conducted the wiretap in such a manner will depend on the facts and circumstances of each case." Scott v. United States, 436 U.S. 128, 140 (1978). And whether the statute has been violated in any particular case

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> monitoring did not commence until it was ascertained that one of the interceptees named in the order authorizing surveillance was in the room.

United States v. Gambale, 610 F. Supp. at 1528. The defendants do not challenge these findings, but contest the district court's legal conclusions.

depends upon the objective reasonableness of the agents' conduct. Id. at 137; United States v. Clerkley, 556 F. 2d 709, 716 (4th Cir. 1977).

We follow the majority of other circuits that have considered this question and look to three key factors to ascertain, in any given case, whether the minimization requirements of section 2518(5) have been met: (1) the nature, scope, and complexity of the alleged criminal activities under investigation; (2) the extent to which the government had accrued, in advance of the surveillance, information needed to screen out conversations that were not within the scope of alleged offenses under investigation through the authorization for surveillance; and (3)

the degree of judicial supervision over the surveillance practices. See id.; United States v. Daly, 535 F. 2d 434, 441-42 (8th Cir. 1976); United States v. Vento, 533 F. 2d 838, 852-53 (3d Cir. 1976); United States v. Quintana, 508 F. 2d 867, 874-75 (7th Cir. 1975). Considering each of these factors, we conclude that the government's surveillance of 98 Prince Street did not violate the statute.

First, the alleged criminal activities that the agents were authorized to investigate were highly organized and complicated, involving multiple parties. In this situation, as the district court pointed out, "'more extensive surveillance may be justified in an attempt to determine the precise

scope of the enterprise.'" United States v. Gambale, 610 F. Supp. at 1529 (quoting Scott v. United States, 436 U.S. at 140).

Second, in the initial stages of surveillance, the monitoring agents could not easily decipher which conversations were and were not relevant to the alleged offenses under investigation. Given the complex nature of the criminal activities in question and the jargon used by those under investigations, it was reasonable for the agents to monitor, almost continuously, the conversations taking place at 98 Prince Street in order to discern patterns of conversation that were and were not relevant. See Scott v. United States, 436 U.S. at 140-42; United States v. Clerkley, 556 F. 2d at 717. This was particularly true during the

early stages of the surveillance, see Scott at 141, which was the only time, the defendants claimed, that the agents intercepted a large number of conversations unrelated to criminal offenses. See United States v. Gambale, 610 F. Supp. at 1529. In addition, the intermittent monitoring technique used by agents to minimize interceptions of conversations beyond the scope of the surveillance authorizations was a reasonable and appropriate method for "spot-checking" the flow of conversations in case the subject matter of those conversations turned from matters outside of the authorized investigation to matters within the surveillance authorization. See e.g., United States v. Hinton, 543 F. 2d 1002, 1012 (2d Cir.

1976) (five minute spot checks not violative of minimization requirement); United States v. Daly, 535 F. 2d at 442 & n.8).

Finally, the district court correctly found that the monitoring agents' submission of regular five-day progress reports to the judge authorizing the surveillance ensured compliance with the minimization requirements of the statute. See United States v. Gambale, 610 F. Supp. at 1528. Such judicial oversight of surveillance practices is recognized as an ongoing check upon the reasonableness of the agents' conduct. See, e.g., United States v. Clerkley, 556 F. 2d at 718; United States v. Quintana, 508 F. 2d at 875.

Given all of these factors, we conclude that the government's monitoring techniques were not unreasonable. The district court correctly concluded that the minimization requirements of section 2518(5) did not require suppression of the tape recordings made at 98 Prince Street.[32]

4. Disclosure

Angiulo's and Kazonis' final complaint regarding the taped conversations is that the district court erred in failing to suppress the tapes on

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[32] The defendants assert that at the very least the district court should have granted their motion for an evidentiary hearing on the minimization issue. Since they failed to allege sufficient specific facts that would substantiate their claim, the district court properly denied their request for an evidentiary hearing. See United States v. Migely, 596 F. 2d 511, 513 (1st Cir. 1979).

the grounds that the government should not have been permitted to disclose or utilize conversations related to crimes other than those for which surveillance was authorized.

Upon intercepting conversations pertaining to RICO violations -- crimes outside the scope of the surveillance authorizations -- the government moved for an order, pursuant to 18 U.S.C. §2517(5), permitting it to utilize that evidence to prosecute the defendants under RICO.[33] A district court judge

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[33] Section 2517(5) provides: When an investigative or law enforcement officer, while engaged in intercepting wire, oral, or electronic communications in the manner authorized herein, intercepts wire, oral, or

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electronic communications relating to offenses other than those specified in the order of authorization or approval, the contents thereof, and evidence derived therefrom, may be disclosed or used as provided in subsections (1) and (2) of this section. Such contents and any evidence derived therefrom, may be used under authorized or approved by a judge of competent jurisdiction where such judge finds on subsequent application that the contents were otherwise intercepted in accordance with the provisions of this chapter. Such application shall be made as soon as practicable.

Section 2517(3) is quoted supra note 28.

other than the judge who presided over the defendants' motion to suppress the tapes had granted the government's motion for disclosure of evidence pertaining to the RICO offenses.

In United States v. McKinnon, 721 F. 2d 19 (1st Cir. 1983), we set forth the standards for such disclosure orders as follows:

> Congress intended that evidence relating to unauthorized offenses should be given retroactive judicial approval under section 2517(5) if the original wiretap warrant was lawfully obtained, was sought in good faith and not as a subterfuge search, and that the communication was in fact incidentally intercepted during the course of a lawfully executed order.

Id. at 22 (quotations and citations omitted) (emphasis in original). The defendants argued in their motion to

suppress, and maintain on appeal, that the government obtained its disclosure motion through subterfuge -- that it always intended to obtain conversations related to RICO violations, but was constrained in applying for surveillance authorization to that end because of our decision in Turkette, restricting application of RICO to wholly legal enterprises -- and that the conversations pertaining to the RICO offenses were not incidentally intercepted. We find no merit in these assertions; the district court's finding that the government's application for surveillance at 98 Prince Street was not subterfuge was not clearly erroneous. See United States v. Gambale, 610 F. Supp. at 1527.

In any event, even if we held that disclosure of intercepted conversations related to "other crimes" was improper and that suppression of those particular conversations was required, the defendants' convictions would stand. As the government points out, all its interceptions of conversations pertaining to the offenses for which Angiulo and Kazonis were convicted were properly authorized by the district court.[34] The

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[34] The government obtained authorization to intercept conversations concerning the operation of an illegal gambling business on January 9, 1981. In the Matter of the Application of the United States for An Order Authorizing the Interception of Oral Communications, M.B.D. 81-12 (D. Mass. Jan. 9, 1981) (order authorizing interception of oral communications). The intercepted conversations introduced against Angiulo to support the charge of illegal gambling were obtained on January 20 and 21, 1981 and in March, 1981. Thus all intercepted conversations pertaining to the offense

for which Angiulo was convicted were fully authorized.

The government was also authorized to intercept conversations pertaining to conspiracy to obstruct and obstruction of state and local law enforcement on February 6, 1981, and on April 3, 1981 obtained further authorization to intercept conversations related to the federal offense of conspiring to obstruct and obstruction of justice. In the Matter of the Application of the United States for An Order Authorizing the Interception of Oral Communications, M.B.D. 81-12 (D. Mass. Feb. 6, 1981) (order authorizing interception of oral communications; In the Matter of the Application of the United States for An Order Authorizing the Interception of Oral Communications, M.B.D. 81-12 (D. Mass. April 3, 1981) (order authorizing interception of oral communications). The tape recordings that the government introduced into evidence against Kazonis to support the obstruction of justice charges were intercepted on March 24 and 25, 1981. Kazonis does not challenge the propriety of the disclosure order allowing the government's use of conversations related to the federal offenses of obstruction of justice, and we find no evidence in the record that those conversations were not incidentally intercepted or were purposefully obtained

unauthorized interceptions that the defendants complain of were RICO-related. The defendants were not convicted on the RICO conspiracy or substantive RICO charges in the indictment, and we have concluded, supra Part IIIB, that the claimed "spillover" effect of the introduction of evidence concerning RICO violations at trial was harmless. Thus, even if we agreed with the defendants and excluded the conversations intercepted at

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by subterfuge. Moreover, since they were sufficiently related to the offenses that were the subject of bona fide surveillance of 98 Prince Street, we find no fault with the disclosure order allow their use by the prosecution. See United States v. McKinnon, 721 F. 2d at 22-23. Cf. United States v. Smith, 726 F. 2d 852, 866 (1st Cir. 1984) (government not required to obtain separate surveillance authorization in "rare case" where elements of state offense, for which surveillance authorized, paralleled federal offense for which government obtained indictment).

98 Prince Street concerning offenses not specified in the surveillance authorizations, we would not disturb their convictions.

E. The Government's Claim of Privilege Not to Disclose at Trial the Location of Microphones at 98 Prince Street, and Subsequent Disclosures to the Boston Globe

At trial, the defendants attempted to extract testimony from government agents concerning the location of microphones used to intercept conversations at 98 Prince Street. The government claimed that it was entitled to a qualified privilege not to disclose that information because disclosure would reveal sensitive surveillance techniques and thereby hinder future criminal investigations. The trial judge recognized the asserted privilege and

allowed the government to withhold the requested information. In response to the defendants' contention that without disclosure they were unable to challenge the government's asserted inferences that they participated in and heard certain conversations at 98 Prince Street, the court gave the jury the following instruction:

> Members of the jury, the defendants in this case have sought to establish the location of the microphones both at 98 Prince Street and 51 North Margin Street. The Government has elected to decline to furnish that information and claims a privilege not to do so. I have ruled that such a privilege exists; and you may draw such inferences, if any, as you may consider reasonable from the absence of evidence before you as to the specific location of the microphones.

Tr. vol. 49, p. 147.

After trial the sentencing, certain newspaper articles appeared in the Boston Globe concerning the investigation at 98 Prince Street. One article appearing April 5, 1987, entitled "FBI bug marked beginning of end for Hub's Mafia leaders," reported:

> Resuming their work, [FBI agents] wired the microphones to power cells the size of fireplace logs and carefully placed them above the dropped ceiling tiles. The installers made sure that the heavy units were safely in place. Their concern was that the ceiling could collapse under their weight, and the units would crash into Angiulo's lap. If that happened, the bugging operation would collapse too. They stuffed mounds of insulation around the power units, the idea being to make it as hard as possible for anyone to find the three power packs. In this case, there would not be any hookup to a telephone or electrical line, not after the Angiulos caught wind of their past efforts to

> use the two utility companies to supply power for a bug and camera. They had learned their lesson not to go outside the agency. The buzzword was self-reliance. The risk of having to reenter the apartment every 30 days to replace the drained power units was determined to be less than the risk of a leak from outsiders.

United States v. Cincotti, 678 F. Supp. 346, 348 (D. Mass. 1987). Another article on April 7, 1987 reported on a discussion between Gennaro Angiulo and Richard Gambale that took place on March 19, 1981. The article states, "Angiulo turned up the TV even louder than usual and lowered his voice. It was 9:29 a.m. and one of the two FBI microphones was hidden directly above the two men." Id. at 349.

Following their convictions, the defendants moved for a new trial,

contending that these articles constituted newly discovered evidence that the government had asserted its privilege not to disclose the whereabouts of the microphones in bad faith, and, as a result, the defendants had been deprived of their constitutional rights to cross-examine and confront government witnesses at trial. We stayed the defendants' appeals to allow the district court the opportunity to rule on the motion for new trial. In a memorandum and order dated July 31, 1987, the district court denied that motion along with the defendants' request for an evidentiary hearing on the government's alleged bad faith. id. at 347-53. Angiulo and Kazonis now assert that the district court erred in denying their

motion for a new trial.

1. The Government's Privilege of Nondisclosure

In its memorandum and order the district court correctly concluded that our recent decision in United States v. Cintolo, 818 F. 2d at 1001-03, was fully dispositive of the government's claimed privilege. In Cintolo we recognized the government's qualified privilege not to disclose, in the course of severed co-defendant Cintolo's trial, the location of the microphones at 98 Prince Street. Id. at 1002. We said that the privilege could be overcome if the defendant could show an authentic and sufficient need for the information that would outweigh the government's privilege. Id. In evaluating the defendant's showing of

need, we considered whether there were "'adequate alternative means'" for the defendant to establish, before the jury, the same points that would be made if the government made the requested disclosures. Id. (quoting United States v. Harley, 682 F. 2d 1018, 1020 (D.C. Cir. 1982)).

Angiulo and Kazonis assert, as did Cintolo, that government testimony concerning the location of the microphones was necessary to their defense because the government relied on inferences that they participated in and heard conversations at 98 Prince Street when they were present there.[35] There

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35 Kazonis points out, for example, that the government interpreted the flow of one conversation as follows:

Gennaro Angiulo: Drink up

was more than sufficient opportunity, however, for the defendants to present their argument to the jury about doubts as to the government's ability to prove the defendants' participation in, and

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> Skinny, you might go away tomorrow.
> William Kazonis: What reason? . . . for what?
> Gennaro Angiulo: Obstructing justice. Right Billy.

Kazonis' version of the same conversation, on the other hand, was as follows:

> Gennaro Angiulo: Drink up Skinny, you might go away tomorrow.
> Unknown male: What reason? . . . for what?
> Gennaro Angiulo: Obstructing justice. Right Billy.
> Unknown male: . . .
> William Kazonis: Who they talking to?

Angiulo presents no separate arguments for need in relation to his own case, but simply adopts, by reference, the arguments made by Kazonis on this point.

knowledge of, conversations that took place at 98 Prince Street. As in the Cintolo case, "the record reflects that the jury heard evidence regarding the size of the Prince Street apartment--evidence from which it could have concluded that not all persons present in the apartment necessarily heard every conversation (let along, every word of every conversation)." Id. at 1003. In fact, the jury was taken to 98 Prince Street for a viewing of the apartment. We made clear in Cintolo that this viewing would be a means for a defendant to raise doubts to the jury concerning his involvement in the conversations. Id.

These factors persuade us that sufficient alternative means other than

disclosure of the location of the government's microphones at 98 Prince Street were not only open to, but were exploited by, the defendants in this case in order to make the point that they wanted to make through use of the privileged information. See id. at 1003. Beyond this, the district court's instruction to the jury singling out the lack of evidence regarding the location of the microphones fully protected the points that the defendant wished to raise; the defendants retained wide latitude to paint a hypothesis about the location of the microphones that would be most favorable to their position. We therefore find no error in the district court's recognition of the government's privilege not to disclose the location of

the microphones.

2. Defendants' Rights to a New Trial

The defendants contend that the articles in the Boston Globe constitute newly discovered evidence warranting the grant of a new trial. They assert that the government's claim of privilege was made in bad faith because the FBI's subsequent disclosure to the press of details concerning the surveillance at 98 Prince Street reveals that the location information sought by the defendants at trial was not, in fact, confidential. They argue that if the information given to the press had been provided to them at trial they would have been able to establish the precise locations of the microphones and would have had a better opportunity to rebut the government's

asserted inference that they participated in incriminating conversations at 98 Prince Street.[36]

Taking into account all the defense affidavits accompanying the motion for new trial "as if there were no valid evidentiary objections to them," the district court concluded that there was little support for the defendants' contention that the government acted in bad faith in claiming its privilege at

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[36] The defendants argue that since the Boston Globe reported that on March 19, 1981 the microphones were directly over the heads of Gennaro Angiulo and Richard Gambale, the FBI must have disclosed the location of the microphones to the press. They contend that if they had known the information reported in that article at the time of trial, they could have questioned Gennaro Angiulo at trial about where he was standing during his discussion with Gambale on that day and thereby proved the precise location of the microphones.

trial. United States v. Cincotti, 678 F. Supp. at 350. It pointed out that the Boston Glove's reports about the location of the microphones over the heads of Gennaro Angiulo and Gambale were just as likely speculations based on journalistic license as they were reports of facts obtained from FBI sources. The court concluded, moreover, that even if the defendants showed bad faith on the part of the government, they failed to show that they were prejudiced or harmed by not having available the "newly discovered evidence" gleaned from the Boston Globe articles at trial.

Motions for new trials are directed to the sound discretion of the trial court. E.g., United States v. Rivera-Sola, 713 F. 2d 866, 874 (1st Cir. 1983);

United States v. Wright, 625 F. 2d 1017, 1019 (1st Cir. 1980). Keeping in mind that such a remedy is sparingly used, we review the district court's denial of the defendants' motion for abuse of discretion. Id. A district court is well within its discretion in denying a defendant's motion for a new trial based on newly discovered evidence if the defendant has failed to demonstrate that access to such evidence would probably result in an acquittal. Id. And any factfinding on the part of the district court will not be disturbed unless clearly erroneous. Id.

We find that the district court was well within its discretion in denying the defendants' motion for a new trial. The defendants failed to show that their

access to the information in the Boston Globe articles would have changed the jury's verdicts. Indeed, given the options available to, and exploited by, the defendants to make their point to the jury about their possible lack of participation in the incriminating conversations at 98 Prince Street and the district court's instruction to the jury about the lack of evidence concerning the location of microphones, the defendants can hardly assert that they would have benefitted from knowledge even of the precise locations of the microphones at trial. Without that evidence they could exploit, to the fullest, hypotheses about the locations that would raise reasonable doubts in the jurors minds concerning their participation in those

conversations.

We affirm the district court's denial of the defendants' motion for a new trial.

F. The Government's Use of Peremptory Challenges

The final argument jointly asserted by Angiulo and Kazonis is that the government's use of peremptory challenges to strike blacks and Italian-Americans from the jury violated their constitutional rights to equal protection according to the Supreme Court's pronouncements in Batson v. Kentucky, 106 S. Ct. 1712 (1986).

The prosecution used 2 of its 7 peremptory challenges to eliminate 2 out of 4 blacks from the 31 member jury venire. It also used 4 of its peremptory

challenges to eliminate 4 out of 7 of the potential jurors who had Italian-American sounding names. The defendants objected to the government's use of peremptory challenges, claiming that it was excluding jurors on account of race and national origin. The district judge then asked the government to explain its use of peremptories, and found that the government had articulated sufficient non-racial and non-ethnic reasons for its challenges. The defendants now argue that they had established a prima facie case of discriminatory use of peremptory challenges by the government, and that the district court erred in concluding that the government's explanation was sufficient to overcome their equal protection claims.

We find no merit in the defendants' assertions. First, as the government points out, to make out a prima facie case of purposeful discrimination under Batson, the defendants must be members of the ethnic or racial group that they contend was discriminated against by the government. Since Angiulo and Kazonis are not black, they cannot complain about the government's peremptory challenges to black members of the jury venire. Batson v. Kentucky, 106 S. Ct. 1723; United States v. Vaccaro, 816 F. 2d 443, 457 (9th Cir. 1987). Second, "[b]ecause appellants did not even attempt to show that Italian-Americans either have been or are currently subjected to discriminatory treatment, their claim fails to meet the initial requirement

under Batson that the defendant show his or her membership in a 'cognizable' group." United States v. Bucci, 839 F. 2d 825, 833 (1st Cir. 1988). For these reasons, the district court correctly rejected the defendants' equal protection claim.

Beyond this, even assuming that the defendants had established their prima facie case under Batson, the Supreme Court said that to overcome a defendant's prima facie showing of discrimination the government must come forward with a "neutral explanation" for its use of peremptory challenges. Here the government provided sufficient neutral explanations for eliminating jurors with

Italian-American sounding names.[37] The district court's finding in this regard, which is "entitled to appropriate deference by a reviewing court," Batson v. Kentucky, 106 S. Ct. at 1724, n.21, is not clearly erroneous.

We therefore conclude that the district court properly overruled the defendants' objections to the government's use of peremptory

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[37] Its reasons were as follows: one juror had provided false or misleading statements in responses to the government's questionnaire; another was observed as answering questions in a "flip" manner; the third was struck because of her recent move to Boston and care of a small child, which the government thought would cause her distractions; the fourth was from a small town where a number of the defendants and their cousins resided.

challenges.[38]

IV.

We find no merit in arguments separately asserted by Angiulo challenging the admissibility of expert testimony of the general counsel of the Massachusetts State Lottery Commission regarding the requirements of

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38 We reach the same conclusion with regard to the defendants' belatedly asserted argument that the government's exercise of peremptory challenges violated their rights "to an impartial jury" under the Sixth Amendment. Even assuming without deciding, that the Sixth Amendment applied to such a case, but cf. Lockhart v. McCree, 106 S. Ct. 1758, 1764-65 (1986) (declining to extend Sixth Amendment "fair cross-section requirement" to selection of petit juries), the defendants' failure to show that the eliminated jurors with Italian-American sounding names were, in fact, members of an Italian-American ethnic group within the community from which they were drawn is fatal to their claim. United States v. Bucci, 839 F. 2d at 834; see United States v. Sgro, 816 F. 2d 30, 33 & n.2 (1st Cir. 1987).

Massachusetts gambling laws and the sufficiency of evidence for his illegal gambling conviction. His challenge to the expert witness testimony was not preserved for appellate review and we find no plain error. See United States v. Williams, 809 F. 2d 75, 82 (1st Cir. 1986). Having reviewed the evidence in the light most favorable to the government, we conclude that the jury properly could have found Angiulo guilty beyond a reasonable doubt for operating an illegal gambling business.

Affirmed.